

TAGORE LAW LECTURES
1901

DEDICATED

BY KIND PERMISSION

TO

SIR LAWRENCE JENKINS, K.C.I.E

Chief Justice of Bengal.

Tagore Law Lectures, 1901

THE INTERPRETATION
OF
DEEDS, WILLS
AND
STATUTES IN BRITISH INDIA

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CALCUTTA

THACKER, SPINK AND CO
LONDON : W. THACKER AND CO

1909

PREFACE.

In this work the author has endeavoured to present in a concise form the principles governing the construction of deeds, wills and Statutes, and it is his earnest hope that it will prove of some assistance to the profession to which he has the honour to belong.

K. SHELLEY BONNERJEE.

June, 1909.

CONTENTS

			PAGE.
SYNOPSIS	...	...	... ix—lii
TABLE OF CASES CITED	...	...	... lii—lxiii
Lecs. I.—Introductory	...	...	... 1— 45
Lecs. II—V.—Deeds	...	...	... 46—104
Lecs. VI—X.—Wills	...	...	... 105—180
Lecs. XI, XII.—Statutes	...	...	... 181—222
INDEX	...	...	... 223—244

SYNOPSIS OF THE LECTURES.

LECTURE I.

INTRODUCTION.

Subject-matter of the lectures (p. 1)—Leading principles laid down by older English authorities governing the interpretation of deeds, wills and Statutes (*ib.*)—Indian Courts to be guided by those principles (*ib.*)—Decisions of Courts of Justice are evidence of what is common law (p. 2)—Spirits and reasons of cases make the law and not the letter of particular precedents (*ib.*)—Deed, will and Statute, defined (*ib.*)—Rules necessary in construing deeds and testamentary instrument (*ib.*)—Certain fundamental rules apply equally to deeds, wills and Statutes (p. 3)—Intention, different meanings of (*ib.*)—Its meaning as used in these lectures (*ib.*)—Presumption *juris et de jure*, applied (*ib.*).

Rule A. The object of the interpretation of deeds, wills and Statutes must be to ascertain the expressed meaning or intention of the maker or makers of the instrument, the expressed meaning being equivalent to the intention.

Intention how to be collected (pp. 3, 4)—Court to proceed upon intention declared or evidenced by surrounding circumstances (p. 4)—*Dicta* of Lord Winsleydale in *Monypenny v. Monypenny* and *Abbott v. Middleton* (*ib.*)—*Dicta* of Lord Cranworth in *Abbott v. Middleton* and also that of Turner, L. J., in *Brodbelt v. Thomson* in construing deed, &c. (*ib.*)—Construction of an Act must be taken from the bare words of the Act (*ib.*)—Business of the interpreter with regard to Statute (p. 5)—Duty of the Court in interpreting a Statute: *Jus dicere non jus dare* (*ib.*)—“Intention” means “expressed intention” in these lectures (*ib.*).

Rule B. A liberal construction should be put upon deeds, wills and Statutes, so as to uphold them, if possible, and carry into effect the intention of the parties.

Maxims in construing written instruments (pp. 5, 6)—Supply of word material to full expression of meaning (p. 6)—Blank in a deed may be supplied in furtherance of obvious intent (*ib.*)—Duty of Court in case of accidental omission (*ib.*)—When Court to supply defect by implication (*ib.*)—Where alternative lies between either supplying words by implication or adopting a construction (*ib.*)—Codicil is part of a will (p. 7)—Sense and meaning of parties to be collected *ex antecedentibus et consequentibus* (*ib.*)—True mode of construing a will (pp. 7, 8)—Rules for construing Statutes and other documents compared (p. 8)—Rule not applicable to certain Acts like *Hindu Wills Act* (*ib.*)—Opinion of Pontifex, S., in *Anangamoni Debi v. Sonamoni Debi* (pp. 8, 9)—Of White in the same case (p. 9)—Effect of decision in the case (*ib.*)—Preference where a clause is susceptible of two meanings (p. 10)—Cases regarding such clauses: *Langdon v. Goole* and *Dhiraj v. Hurdeo* (p. 10)—Deeds and contracts of Indians to be liberally construed (p. 11)—Gift of all the testator's property followed by gift of specific part of it (p. 12)—Power of Court in making transposition of a clause or expression to render it consistent with context (*ib.*)—Alteration of language of testator (*ib.*)—Case of such alteration: *Soulle v. Gerrard* (pp. 12, 13)—Words of Statutes to be construed *ut res magis valeat quam pereat* (p. 13)—Words and phrases may be controlled by the context (*ib.*)—Proper steps in construing words of an instrument (pp. 14, 15)—Legal maxim embodied in the rule (p. 15)—Words 'Malik' and 'Dhakhilar' how construed (p. 16)—Devise to widow for her maintenance with power of alienation *held* as conferring an absolute estate (*ib.*)—Construing of the same words occurring in different parts of a will (*ib.*)—Duty of Court as to construction of Statutes passed by Legislature (pp. 16—20)—When two constructions are open (p. 16)—Constructions of Statute when may be rejected (p. 17)—Construing of words "shall," "may" and "must" (*ib.*)—Sound rule of construction where context discloses a manifest inaccuracy (p. 18)—Right of construing an Act (*ib.*)—General provisions in Statute not to control or repeal special provisions (*ib.*)—Reason for the same (p. 19)—Use of general words in a restricted sense from the context, how to be inferred (p. 20)—Grammatical and ordinary sense of the word when may be modified (*ib.*)—Lord Wensleydale's

golden rule as to grammatical and ordinary sense of a word (p. 21)—*Malik*, different meanings of (*ib.*)—Principle laid down by Turner, L. J., regarding such sense of the word in delivering judgment of Privy Council in *Soorjeemoney Dossree v. Dinobundo Mullick* (*ib.*)—Duty of Court in interpreting a deed, will or Statute (page 22)—Literal construction of a Statute when ought not to prevail (p. 23).

Rule C. Where the language of a deed, will or Statute is plain and unambiguous, and admits of one meaning only, that meaning, and that meaning alone, is to be given to it.

Right of Court as to the plain meaning of the language used when contrary to the probable intention of the maker or makers of the instrument (p. 24)—Remark of Jessel, M. R., regarding argument of inconvenience in *Bottomley's case* (*ib.*)—Section 94 of Evidence Act (*ib.*)—Principle laid down by Wigram, V. C., as to the sense of the word (*ib.*)—Maxim *Absoluta sententia exppositore non egit* (p. 25)—In *Kristoromoni Dassee v. Maharaja Narendra Krishna Bahadur* Court refused to put an interpretation on the will which would have necessitated reading the word "and" as "or" (*ib.*)—There is no place for interpretation or construction unless words of a Statute admit of two meanings (*ib.*)—Business of interpreter not to improve the Statute but to expound it (p. 26)—Practice of a Court cannot make lawful that which is unlawful (*ib.*)—Nor can a practice of a Court justify a Court in putting upon an Act of Legislature a construction which is contrary to the wording of the Act (p. 27)—Intention of Legislature must be ascertained from the words of a Statute and not from general inference (*ib.*)—Exception to Rule C which does not apply to deeds and wills (*ib.*)—Cases of such exception (pp. 27, 28)—Maxim in cases of this description: *a verbis legis non recedendum est* (p. 28)—Lord Coke's definition of "Equity of the Statute" (*ib.*)—Court of Justice to take into consideration the spirit and meaning of Act apart from words (*ib.*)—Reason why this construction by equity is applicable only to Statutes and not to deeds and wills (p. 29)—A striking instance of the equity of Statute (*ib.*).

Rule D. A latent ambiguity may, but a patent ambiguity cannot, be explained by extrinsic evidence.

"Patent ambiguity" defined (pp. 29, 30)—Principle on which the rule is founded (*ib.*)—Extrinsic evidence may not be given to

explain a "patent ambiguity" (p. 30)—Section 93 of Evidence Act (pp. 30, 31)—Section 68 of Indian Succession Act (p. 31)—Instances of "latent ambiguity" (*ib.*)—Sections 95, 98 of Evidence Act (*ib.*)—Sections 63, 65 and 67 of Indian Succession Act (*ib.*)—Admissibility of evidence in case of latent ambiguity (*ib.*)—Also where language used applies partly to one set of existing facts and partly to another set of existing facts but whole of it does not apply to either (pp. 31-32)—Section 95 of Evidence Acts embodies the old maxim *falsa demonstratio non nocet* (p. 32).—Application of the maxim to wills by sections 63 and 65 of Indian Succession Act (*ib.*)—Extrinsic evidence may be given to show meaning of illegible or not commonly intelligible characters (*ib.*)—Investigation and ascertainment of meaning and sense of the language (pp. 32, 33)—When and why such investigation necessary (p. 33).

Rule E. The circumstances under which a deed, will or Statute was made may be taken into consideration in interpreting it.

Section 92 of Evidence Act and section 62 of Indian Succession Act compared with reference to the Rule E (p. 34)—Situation of parties and their rights must be looked at in construing a written instrument (pp. 34, 35)—Court to place itself in the position of testator with knowledge of all the facts with which he was acquainted but not to introduce any evidence whether of what were the intention of the testator as contrasted with the language used (p. 35)—When Court to adopt the construction put by sages of law in construing a Statute (*ib.*)—Change in the practice of Indian Courts by decision in *Administrator-General of Bengal v. Prem Lall Mullick* (p. 36)—Maxim *Certum est quod certum reddi potest* (*ib.*).

Rule F. A word or phrase in a deed, will, or Statute to which no sensible meaning can be given, must be eliminated.

Power of Court to alter, insert, construe and reject any word in a deed, will or Statute (p. 37)—When a word or a phrase can be eliminated (*ib.*)—When can be rejected (*ib.*)—Maxim to deal with words and phrases in an instrument to which no sensible meaning can be attached: *Surplus agium non nocet* and *Utile per inutile non vitiatur* (*ib.*)—Rules to interpret a deed, will or Statute summarised (p. 38)—Application of the rules to each of three classes of written instruments (p. 39)—Bacon's definition of Statute (*ib.*)—Statute, deed and will compared (*ib.*)—Maxim with reference

to interpreting a Statute: *Qui paret in litera paret in cortice (ib.)*—Deed and will compared (pp. 40, 41)—Section 61 of Indian Succession Act (p. 40)—Deed and will distinguished (pp. 41, 42)—Rules of equity with regard to gifts by deed and gifts by will (*ib.*)—Remarks of Jessel, M. R., with respect to decisions on the interpretation of written instruments (pp. 42, 43)—Remark of Lord Halsbury, L. C., in *In re Jadrell* on the same point (pp. 43, 44)—Remark of Lindley, L. J., in the same case on the same point (pp. 44, 45)—Way in which decisions upon interpretation of written instruments should be treated by Court for assistance (p. 45).

LECTURE II.

DEEDS.

Definition of Deed (p. 46)—Use of form in delivery of a deed (*ib.*)—Practice for same (*ib.*)—Retention of deed by its maker does not impair its validity nor prevent its operating at once (*ib.*)—A policy “signed, sealed and delivered” is complete and binding as against the party executing it (*ib.*)—Registration of a deed of sale is sufficient delivery of deed (pp. 46, 47)—Parol testimony when parties have deliberately put their mutual engagements into writing should be rejected (p. 41)—Its reason (*ib.*).

Rule 1. Oral evidence cannot be received to contradict, vary, add to or subtract from the terms of a deed as between parties to the deed or their representatives in interest.

Evidence Act, s. 92 (p. 47)—Rule 1 is not a rule of interpretation but a rule of law limiting the subject-matter to be interpreted (*ib.*)—Rule may be traced back to remote antiquity (*ib.*)—Inconvenience that might result if deeds were liable to be controlled by the uncertain testimony of slippery memory (*ib.*)—*Dicta* of James, L J., in *Ligott v. Barrett* (p. 48)—Cases instances the *dicta* (*ib.*)—Rule applies to (a) document containing whole of the agreement between parties, (b) parties and their representatives in interest, (c) cases in which some civil right or civil liability is dependent upon terms of document in question (pp. 48, 49)—When extrinsic evidence may be given (p. 49)—Any person other than a party to a document may, notwithstanding the document, prove any fact he is otherwise entitled to prove (*ib.*)—Meaning of the phrase “between the parties to the deed” (*ib.*).

Any party to a deed or any representative in interest of any such party may prove any fact for any purpose other than that of varying or altering the deed (pp. 49, 50)—Evidence when admissible to prove the date of delivery (*ib.*)—Time when deed takes effect (*ib.*)—Date of deed means date of its execution (*ib.*)—Date how to be construed

where deed bears no date or an impossible date and reference to date made in the deed (*ib.*).

Rule 2. Extrinsic evidence may be given which would invalidate any document, or which would entitle any person to a decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law.

Cases where admission of intrinsic evidence does not violate Rule 1 (pp. 50, 51)—Requisites of a valid contract (p. 51)—Wagering contract (*ib.*)—Evidence Act, s. 92, illus. (d) and (e) (*ib.*)—Fraud vitiates all deeds (*ib.*)—Extrinsic evidence admissible to prove fraud (*ib.*)—Conflict among the Indian decisions as to whether fraud must be contemporaneous with the deed or whether subsequent fraud will affect the deed (*ib.*)—Conflict of opinion for the same (*ib.*)—When parol evidence may be given (p. 52)—Contract made for objects forbidden (*ib.*)—Obtained by improper means (*ib.*)—Legal impediments to contract (*ib.*)—Deed made without consideration is void : Contract Act, s. 25 (*ib.*)—Want or failure of consideration : admissibility of parol evidence to show (*ib.*)—Mistake of fact akin to fraud in equity (*ib.*).

Rule 3. The existence of any separate oral agreement as to any matter on which a deed is silent and which is not inconsistent with the terms of the deed may be proved.

Section 92, Prov. 2 of Evidence Act (p. 53)—Evidence where oral agreement is inconsistent with terms of the deed (*ib.*)—Proof of subsequent agreement where promissory note is silent as to interest (*ib.*)—Regard to character and formality of document necessary for admissibility of evidence (*ib.*)—Evidence where document is informal (*ib.*).

Rule 4. The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under a deed may be proved.

Evidence Act, s. 92, Prov. 3 (p. 53)—This Rule not clashing with Rule 1 (*ib.*)—Construing of document when there is condition precedent (*ib.*)—Subject-matter of condition precedent is *dehors* the contents of the deed (*ib.*)—Until condition is performed there is no

written agreement at all (*ib.*)—Application of this Rule where major portion of obligations performed (p. 54)—Meaning of words “any obligation” (*ib.*).

Rule 5. Any usage or custom by which incidents not expressly mentioned in the deed are usually annexed to contracts of the description of the one contained in the deed may be proved: Provided that the annexing of such incidents would not be repugnant to or inconsistent with the express terms of the deed.

Evidence Act, s. 92, Prov. 5 (p. 54)—When supply of terms of known usage in control of contracts allowed (*ib.*)—“Annexing incidents” (*ib.*)—Rule 5 is framed upon principle that contract was itself framed with reference to the usage (*ib.*)—Terms of contract are expounded by usage (*ib.*)—Incidents referred to in this Rule are creatures of mere usage (*ib.*)—Usage may by judicial recognition be received as part of law merchant (*ib.*)—In such cases it is obligatory without special evidence (*ib.*)—Marine Insurance (*ib.*)—Condition of sea-worthiness (*ib.*)—Custom cannot affect express terms of a deed (p. 55)—Practice on a particular estate as a term of contract when may be imported into a contract (*ib.*)—Summary of the preceding five rules regarding deeds (*ib.*).

LECTURE III:—DEEDS—*contd.*

IN addition to extrinsic* evidence allowed by Rules II—V, another description of evidence is admissible to assist Court in interpretation of a deed (p. 56)—Such evidence helps to explain sense in which the parties understood the terms of the deed (*ib.*).

Rule 6. Evidence is admissible of every material fact that will enable the Court to identify the person or thing mentioned in the instrument and to place the Court whose province it is to interpret the deed as near as may be in the situation of the parties.

Evidence Act, s. 92, Prov. 6 (p. 56)—Admissibility of evidence necessary for applying the deed to the facts, determining what passes by it and who take an interest under it (*ib.*)—Reference to “Treatise on the admission of extrinsic evidence under the 5th proposition” (p. 53, 3rd Edn.) by Wigram, V. C. (*ib.*)—Court how to construe and apply words of an instrument (pp. 56, 57)—Extent of extrinsic evidence to point the operation of simple instrument (p. 57)—Principle not affected by construction (*ib.*)—Extrinsic evidence in interpreting an instrument which purports to deal with property (*ib.*)—When investigation must stop (*ib.*)—Rule 1 does not exclude evidence of conduct of parties where such conduct is relevant (p. 58)—Subsequent conduct of parties held admissible in *Kashee Nath Chatterjee v. Chundy Churn Bannerjee* to show whether an instrument was a deed of sale or a mortgage (*ib.*)—That decision held to have been overridden in *Daimodee Paik v. Karim Tarida* by s. 92 of the Evidence Act (*ib.*)—But the principle laid down in *Kashee Nath Chatterjee* approved and followed in numerous cases (pp. 58, 59.)—Matter now set at rest as far as the Calcutta High Court is concerned by the Full Bench decision in *Preo Nath Shah v. Madhu Sudan Bhunja* (p. 59)—When parol evidence can be given of the original agreement (pp. 59, 60)—In *Valampuducherri v. Chowakaren* it was held in a suit for redemption of land that oral evidence was admissible to apply a document containing an acknowledgment of title to the land to which it was intended to refer (*ib.*)—Where a letter acknowledging a debt was

addressed to Mrs. W., oral evidence was admissible to show that Mrs. S. was known as Mrs. W. and also for identifying the debt (p. 60.)—Application of the rule to maxim “*Contemporanea expeditio est optima et fortissima in lege*” (p. 60.)

Rule 7. When the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words.

Term “literal meaning” explained (pp. 60, 61)—Literal meaning of technical words is their technical meaning (p. 61)—Admissibility of extrinsic evidence to determine the literal meaning of words used (*ib.*)—The words “the whole and entire property absolutely” held to pass the whole interest whether in possession or expectation (*ib.*)—The word “Santan” may mean “issue” generally and include daughters (*ib.*)—The word “naslan-bad-naslan” confers absolute ownership (*ib.*)—Rule as to interpretation of mercantile contracts (*ib.*)—“Usual mercantile contract” and “Unusual mercantile contract” how construed (pp. 61, 62)—Evidence Act, s. 94 (p. 62)—Sale with right reserved of repurchase within a period not necessarily to be construed as a mortgage (*ib.*)

Rule 8. Where, if the words in a deed are used in their literal meaning, an absurdity or inconsistency appears, such of the other meanings that they properly bear may be placed upon them to avoid that absurdity or inconsistency.

This Rule is adapted from Lord Wensleydale’s Golden Rule (p. 63)—A general word may be said to have a secondary meaning affixed to it when it is used in a restricted sense (*ib.*)—When the operation of the general words are to be limited (*ib.*)—What *onus* lies on those who contend for limited construction (*ib.*)—General words following specific words how to be construed (pp. 63, 64)—The word “aivaj” though may mean “property” generally but with reference to the content of a document it means “moneys or sums” (p. 64)—“For her sole absolute use and benefit” held to mean that it was to be held by her in severalty from the joint estate and as a Hindu widow she had only a life-estate in the *corpus* (pp. 64, 65).

Rule 9. Extrinsic evidence may be given to explain a latent but not a patent ambiguity in a deed.

Evidence Act, ss 93, 95 (p. 65)—The terms “latent ambiguity” and “patent ambiguity” defined (*ib.*)—The distinction between the two (pp. 65, 66)—Parol evidence is not admissible in case of patent ambiguity (p. 66)—The land within the boundary passes under the deed whether it be more or less than the quantity specified in the deed (p. 67)—An equivocation is the only case where it is permissible to give extrinsic evidence of the intention of the parties to the deed (*ib.*)—Where one part of description applies to one object and another part to another object, but the description as a whole applies to no object, the case is similar to that of a patent ambiguity and direct evidence of intention is not admissible (*ib.*).

LECTURE IV.—DEEDS—*contd.*

Component parts of a deed and the bearing each has to the rest (p. 68)—“Indenture:” what was meant by the term (*ib.*)—Terms “counterpart” and “counterpanes” explained (*ib.*)—Practice, in old times and at the present time, of writing (*ib.*)—Terms “original,” “the counterpart” and “duplicate originals,” explained (*ib.*)—“Indenture,” meaning of the term, at the present time (p. 69)—“Deeds-poll,” why the term is so called (*ib.*)—The term is now applied to deeds where the person executing are all of one part (*ib.*)—Greater part of deeds-poll are powers of attorney (*ib.*)—Some statutory forms of conveyance to Railway Company are “deeds-poll” (*ib.*)—Date to a deed (*ib.*)—Its place in “indenture” and “deeds-poll” (*ib.*)—Its effects on deed as to priority of title (*ib.*)—Where date stated in the deeds is different from the time of delivery, deeds take effect from the latter time (*ib.*)—Where several inconsistent deeds are executed, they take effect according to the several times of their delivery and not of their date (*ib.*)—Name of every person whose intentions are expressed by any instrument should be formally stated (*ib.*)—Where all persons have identical intentions they express them by means of a deed-poll, but when not so by means of an indenture (*ib.*)—The term “identical intention” explained (p. 70)—Form where date and names of parties are stated at the beginning of an indenture (*ib.*)—Formal method of stating parties to a deed-poll varies according as it does or does not contain recitals (*ib.*)—Form immaterial in contracts not under seal (*ib.*)—Form where contracts prepared in a formal manner (pp. 70, 71)—Form where contract long and divided into numbered paragraphs (p. 71)—Description of parties otherwise called additions (*ib.*)—No strict rule as to minuteness of description necessary (*ib.*)—All that is required is to describe parties with such a degree of accuracy that no confusion will arise (*ib.*)—Order in which the parties are arranged is a matter of custom (*ib.*)—Placing of recitals (p. 72)—Recital not a part of a deed (*ib.*)—When recital not to control operative clauses (*ib.*)—Recitals how to be arranged (*ib.*)—Exceptions how to be ranged (*ib.*)—Two classes of recitals, *narrative* and *introductory*,

explained (pp. 72, 73)—Consideration for a contract or deed means the motive that affects the parties (p. 73)—Two kinds of consideration, *valuable* and *good*, explained (pp. 73, 74)—Witnessing clause (p. 74)—Clause acknowledging its receipt (*ib.*)—Operative portion of the deed (*ib.*)—Distinct meaning of various operative words, *appoint*, *assign*, *alien*, *confirm*, *convey*, *grant*, *livery*, *surrender*, *release*, *remise*, *release and quit claim*, *acquit*, *release and quit claim*, and *demise* (pp. 74, 75)—Parcels where inserted in a deed (p. 75)—A thing how designated (p. 76)—Modes of designating or identifying (*ib.*)—Manner of referring to the parcel in the recitals (p. 77)—General description of parcels may be restrained by qualifications either implied or express (pp. 77, 78)—Maxim *Non accipi debent verba in demonstrationem falsam qui competit in limitationem veram* (p. 77).—Introduction of the principle of *Falsa demonstrationem non nocet* (p. 78).

Rule 10. A deed should be interpreted, so as to take effect, if possible, according to the intention of the maker or makers.

Principle stated in Rule B, Lecture I, that is, deed can operate in two—one consistent and the other repugnant to intention (p. 78). General rules and maxims of law with respect to construction of deeds (pp. 77, 78). Maxims *ut res magis valeat quam pereat*, i.e., the end and design of deeds should take effect rather than the contrary (p. 78), and that words in a deed to be construed in such a way as is agreeable to the intention of the grantor (pp. 77, 78).

Rule 11. When the intention of the maker or makers of a deed cannot be given effect to its full extent, effect is to be given to it as far as possible.

A deed that is intended and made for one purpose may enure to another (p. 79)—Therefore a deed made and intended for a release may amount to a grant of a reversion, an attorney, or a surrender or *é converso* (*ib.*)—The use of the words “as malikana” in a deed held to reserve and create a perpetual and heritable charge upon the property (*ib.*)—So also a lease created by a covenant with a man that he should enjoy the land for a certain time and by a mere lease to occupy for a certain time (*ib.*)—Where diverse persons join in a deed and some are able and some not able to make such deed the deed belongs to those that are able (pp. 79, 80)—Where mortgagor and mortgagee join in a lease, this enures as a lease to the mortgagee and

confirmation by mortgagor (p. 80.)—A joint lease by a tenant-for-life and remainderman operates during the life of tenant and afterwards as the demise of the last-mentioned party (*ib.*)—Where illegal from legal part of a contract cannot be severed contract is altogether void, but where it can be severed the bad part to be rejected (*ib.*)—Gift to a class, some of whom cannot take; how to be construed (*ib.*)—Formerly such gift was void for remoteness (p. 81)—Decision of the Privy Council in *Asmaida Koer's* case modifying the former ruling (*ib.*).

Rule 12. When the operative part of a deed is clear, it cannot be controlled by the recitals or other parts of the deed.

Clear words of conveyance cannot be controlled (p. 81)—Recital in a deed is not at all a necessary part either in law or equity, it may be used to explain a doubt of the intention and meaning of the parties (*ib.*)—Mis-recital of another document in a deed when does not destroy the effect of the deed (*ib.*)—Where recitals and operative part of a deed are at variance, the latter must be officious and the former inofficious (pp. 81, 82)—Where both recitals and operative part are clear but inconsistent with each other, the operative part prevails (p. 82)—Recital in a bond that the parties had agreed to execute a bond for £500 which bond was taken in the penalty of £1,000 held not to control the bond (*ib.*)—Recital in a transfer of a mortgage that the mortgage contained a power of sale which had not been and was not intended to be exercised, followed by an assignment of moneys due on the mortgage and all powers and remedies for recovering such moneys and all benefit under the mortgage transferred *held* not to operate so as to prevent the exercise of the power of sale (*ib.*).

Rule 13. When the operative part of a deed is ambiguous or goes beyond the recitals, it may be controlled by the recitals and other parts of the deed.

Control of recitals and other parts of the deed over the general words in the operative part (p. 82)—Chief instances of this rule are releases (*ib.*)—Where a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, how the law will construe it in order to prevent surprise (*ib.*)—Clear words of conveyance cannot be controlled by words of recital (p. 83)—But “clear words of conveyance” is subject to interpretation

(ib.)—In releases where general words are amply sufficient to cover anything, the recitals clearly restrict the effect of the lease (ib.)—Where parcels referred to in the recitals and appearing in the operative part, how construed when there is a discrepancy between the recitals and operative part (ib.)—Recitals are the key to what is intended to be done by the deed (ib.)—General words may be put into guard against accidental omission (ib.)—A deed in the absence of indication of a large meaning must be held to refer to estates or things of the same nature with those already mentioned (pp. 83, 84)—Recital may explain an ambiguity but cannot have the effect of introducing a covenant in it (p. 84).

Rule 14. A mis-recital will not vitiate the deed if it be sufficiently clear what is intended.

Time when a reversionary lease to commence if an existing lease to A is recited in it and the date is incorrectly stated and words “from and after the lease to A” appear in the habendum (p. 84)—Mis-recital may influence the construction (ib.)—Case where advowson did not pass merely by the force of the word “Manor” (ib.)—Erroneous recital of grantor’s earlier title does not preclude his grantee from showing what interest really passed by his grant (ib.)—Mis-recital may also operate by way of estoppel (p. 85)—Principle of estoppel (ib.)—A recital must be precise and unambiguous in order to operate as an estoppel (ib.)—It must not be general in its term (ib.)—A recital of a particular fact in express terms cannot be got rid of by showing what the intention of the parties was (p. 86)—When the language is general, intention from the terms of the whole deed may be collected (ib.)—Estoppel where all parties to the deed have mutually agreed to admit the recital as true and where it is intended to be statement of one party only (ib.)—When a party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital (ib.).

Rule 15. The express mention of one thing implies the exclusion of another.

Maxims: *Expressio unius est exclusio alterius* and *expressum facit cessare tacitum* (p. 86)—An implied covenant to be controlled within limits of an express covenant (p. 87)—Where a lease contains an express covenant on the part of the tenant to repair, there can be no implied covenant to repair arising from relation of landlord and

tenant (*ib.*)—Expressed stipulations in written engagement are not to be extended by implication (*ib.*)—Where in a sale-deed of fields containing a well-tax payable on the field was expressly provided but silent as to tax on well: *held*, tax on well could not be recovered (*ib.*)—Caution necessary in dealing with the maxim “*expressio unius est exclusio alterius*” (*ib.*)—It is not of universal application but depends upon the face of the instruments or of the transaction (*ib.*)—Proper application of the maxim how made where general words are used in a written instrument (pp. 87, 88). Where an expression which is *prima facie* a word of qualification is introduced how the true sense and meaning of the word can be ascertained (p. 88).

Rule 16. An alteration in a material point avoids a deed unless the alteration is made with the privity of the obligor and obligee.

Material alteration, defined (p. 88)—Where alteration made with consent of parties to express an intention which was not their intention at the time of execution thereof; no party can enforce any original obligation (*ib.*)—Alterations, interlineations and erasures presumed in the absence of evidence to the contrary to have been made before execution (*ib.*)—Alteration after execution is fraudulent and in many cases highly criminal (*ib.*)—Deed only avoided when a material alteration made after its execution and without the consent of any party; but if the parties consent the deed as altered is binding on them (pp. 88, 89)—Material alterations by a stranger do not prevent any person from enforcing the deed (p. 89)—Stranger is a person not a party to, or claiming under a party to, the deed (*ib.*)—Person in custody of the deed when the alteration was made cannot enforce the deed (*ib.*)—An immaterial alteration does not affect the deed or the rights of any person thereunder—(*ib.*)—Immaterial alteration, defined (*ib.*)—Addition of words “on demand” in a promissory note without assent of the maker did not affect the validity of the instrument (*ib.*).

Rule 17. Matters referred to are regarded as actually inserted in a deed.

Maxim “*Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur*” (p. 89)—A deed or written instrument must be construed by the language of any clause in question and

also by any other clause or covenant, incorporated with it by reference (p. 90)—An instance where the schedule being held to form part of the deed (*ib.*)—Where contract of sale refers to an inventory, the contents thereof become incorporated with the contract (*ib.*)—Plan forming part of the contract or Act (*ib.*)—Where a deed of conveyance should be read as if the section of the Act are applicable to the subject-matter of the grant (*ib.*)—Where a deed recited a contract for the sale of certain lands by a description corresponding with that subsequently contained in the deed: Schedule, map and plan how they affect the interest of the parties (pp. 90, 91)—Maxim “*Verba relata misse videntur*” (p. 91).

LECTURE V.—DEEDS—*contd.*

Definition of the term "Covenant" (p. 92)—Its derivative meaning (*ib.*)—Covenants now distinguished (*ib.*)—How long a covenant is neither a duty nor a cause of action (*ib.*).

Rule 18. No particular form of words is necessary to create a covenant.

Formal or orderly words as "Covenant," "Promise," and the like, are not necessary to make a covenant (p. 93)—It is sufficient if, from the construction of the whole deed, it appears that the party means to bind himself (*ib.*)—A declaration of trust is equivalent to a covenant (*ib.*)—When a recital in a deed may operate as a covenant (*ib.*)—When a recital in a creditor's deed amounts to a covenant to the composition (*ib.*)—A recital in a separation-deed that the husband and wife had agreed to live apart, how construed (*ib.*)—A mere admission of a debt by a recital is an implied covenant for payment when the recital has no other object (p. 94).

Rule 19. Where a deed contains express covenants, no implication of any other covenants on the same subject-matter can be raised.

An express covenant supersedes the covenant which might have been implied from recital (p. 94)—Where in a conveyance express covenants for warranty are introduced none can be implied from general words (*ib.*)—Where a tenant holds under an express contract no implied contract to repair can be inferred (*ib.*).

Rule 20. The words of a covenant are to be taken most strongly against the covenantor, due regard being paid to the intention of the parties as collected from the whole content of the deed.

Ambiguous words shall be taken most strongly against the grantor and in favour of the grantee (p. 94)—Maxim "Verba fortius

accipiuntur contra preferentem" (*ib.*)—The principles of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words (*ib.*)—All manner of deceit in any grant avoided (*ib.*)—Rule not applying to a grant by Crown at the suit of the grantee (p. 95)—Grant of all claims of grantor by a deed includes existing and future claims (*ib.*)—Covenant for title binds the covenantor and his representatives and alienees (*ib.*)—Acts, meaning of (*ib.*)—Means, meaning of the word (*ib.*)—When notice of defect not binding upon the purchaser of title (pp. 95, 96)—When there are a grant and an exception out of it the exception is to be taken as inserted for the benefit of the grantor and to be construed in favour of the grantee (p. 96)—Where the grant is clear and exception bad for uncertainty, the grant is operative and the exception fails (*ib.*)—King's grant to be taken most strongly against the grantee and most favourably for the king (*ib.*).

Rule 21. A covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction.

Rule laid down by Gibbs, C. J. (p. 97)—In case of a covenant with *A* and *B* jointly that a certain thing should be done by the covenantor; both of *A* and *B* must sue but where it appears on the face of the deed that *A* and *B* have several interest, *A* and *B* must sue separately (*ib.*)—But where the words of a covenant are in their nature ambiguous, the deed supplies the mode of their construction (*ib.*)—Where there are several parties if the interest be joint the covenant must be joint although the words of the covenant be several (pp. 97, 98)—Instances for the same (p. 98).

Rule 22. The question whether a sum named to be paid on non-performance of a covenant is a penalty or liquidated damages, depends on the construction of the whole deed.

Primary rule as to whether a sum named to be paid on non-performance of a covenant is a penalty or liquidated damages (p. 98)—Certain subordinate rules for Court to construe agreements of this description (p. 99)—The words "liquidated damages" describing the nature of payment are by no means conclusive (*ib.*)—Held to be conclusive in *Reilly v. Jones* and otherwise in *Kemble v. Farren* (*ib.*)—*Onus* of proof lies upon those asserting "liquidated damages" as a

penalty (*ib.*)—How far the law altered by the decision in *Wallis v. Smith* (*ib.*)—Presumption where one lump sum is made payable as compensation on occurrence of one or more or all of several events some of which are serious and others but trifling damages (*ib.*)—Law where payment is conditioned on one event and where on more than one event (*ib.*).

Rule 23. Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent contract.

Contracts where the obligation of one promise independent of the performance of the other (p. 100)—Where promises not only mutual but also dependent (*ib.*)—Three kinds of covenants: (a) mutual and independent; (b) conditional and dependent; (c) where mutual conditions to be performed at the same time (*ib.*)—Dependence or independence of covenants how to be collected (p. 101)—*Dicta* of Lord Ellenborough in *Richie v. Atkinson* as to the means of discovering intention of the parties (*ib.*)—What are mutual conditions (*ib.*)—Precise technical words not necessary to make stipulation a condition *precedent* or *subsequent* (*ib.*)—Restrictive covenants (p. 102)—Rules to govern their construction (*ib.*)—Where any sentence contains distinct covenants and there are restrictive words: How far are these restrictive words extended (*ib.*)—Restrictive words inserted in the first of several covenants are construed to extend to all the covenants (*ib.*)—But where covenants are of divers nature and concern different things, restrictive words added to one shall not control the generality of others (*ib.*)—Where two covenants relate to the same object restrictive words in the second may control the generality of the first (*ib.*)—Restrictive covenant may be partly affirmative and partly negative (*ib.*)—Section 27 does away with the distinction between partial and total restraint of trade observed in English cases following upon *Mitchel v. Reynolds* (*ib.*)—Agreements in restraint of trade are governed by s. 27 of the Contract Act (*ib.*)—Must show a good consideration (p. 103)—Agreements contrary to public policy are not given effect to (*ib.*)—Stipulation prohibiting any sales of goods during a particular period, of a similar description to those bought under the contract not within the purview of s. 27 (*ib.*).

Rule 24. When two clauses in a deed after applying all permissible rules of construction remain inconsistent and repugnant to each other, the former prevails.

Personal covenant followed by a proviso that covenantor not liable under the contract, the proviso is inconsistent and repugnant to the covenant (p. 103)—Interpretation of deed depends upon the particular state of facts belonging to or connected with it (p. 104)—But principles made for each particular state of facts are generally applicable to the construction of deeds in general (*ib.*)—In case of mercantile documents construction given to them years ago and accepted in Courts of law should not be in the least altered (*ib.*).

LECTURE VI.

WILLS.

(a) A will is the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death.

(b) A codicil is an instrument made in relation to a will, and explaining, altering, or adding to its dispositions. It is considered as forming an additional part of the will.

Succession Act, s. 3, and Probate and Administration Act, s. 3 (p. 105).—Definition and characteristics of will and codicil (pp. 105, 106)—A codicil is treated as being separate from will when two bequests are given to the same person (p. 106)—Succession Act, s. 88 (*ib.*)—Case where codicil admitted to probate although the will has been revoked (*ib.*).

Rule 1. To the Court of the domicile belongs the interpretation and construction of the will of the testator.

The administration of the personal estate of the deceased—Questions of testacy and intestacy—Personal representative of the deceased—Interpretation and construction of the will of the testator—To determine who are the next-of-kin or heirs of the personal estate of the testator belong to the Court of domicile (p. 106)—Court of domicile is the *forum concursus* (*ib.*)—Law of British India regulates the succession to the immovable property in British India and law of the country in which the testator had his domicile at the time of his death regulates the succession to movable property of the deceased (pp. 106, 107)—“A bequest to the children of a foreigner,” meaning of (p. 107.)—Legitimacy of a child how to be established (*ib.*)—Law that governs domicile of a person (*ib.*)

Rule 2. No technical forms are necessary to convey the intention of the testator.

Succession Act, s. 65 (p. 107)—Particular form and language appropriate to its testamentary character not requisite to the validity

of a will (*ib.*)—Intention of the maker respecting the posthumous destination of property sufficient (*ib.*)—A testator is presumed to be *inops consilii* (*ib.*)—Wills of persons governed by Succession Act, Hindu Wills Act and Oudh Estates Act must conform to the provisions of s. 50 of Succession Act (*ib.*).

Rule 3. The object of the interpretation of a will is to give effect to every part if possible.

Golden rule of construction (p. 107)—A will must be read to lead to a testacy and not intestacy (*ib.*)—Where a clause is susceptible of two meanings how to be construed (*ib.*)—Succession Act, s. 71 (*ib.*)—When words in a will are used capriciously to avoid anomalies grammatical construction not to be followed accurately (*ib.*)—No part of will to be rejected as destitute of meaning (*ib.*)—Succession Act, s. 72 (*ib.*)—Effect means legal effect (*ib.*)—Steps to interpret a will in order to give effect to it (pp. 108, 109).

Rule 4. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a codicil is to be taken as forming part of a will.

Succession Act, s. 69 (p. 109)—The spirit of a will may overcome the letter (*ib.*)—True mode of construing a will (*ib.*)—Transposition of a clause or an expression in a will are permitted when otherwise senseless and contradictory (p. 110).

Rule 5. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be used in a wider sense than that which they usually bear, when it may be collected from the other words of the will that the testator meant to use them in such wider sense.

Corollary.—If the same words occur in different parts of the will they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.

Succession Act, ss. 70, 73 (p. 110)—Principle upon which to proceed to interpret a will (*ib.*)—Common meaning to be given to the words unless something reasonably plain upon the face of the document

shows that they are not used with that meaning (*ib.*)—Contention of limited construction, *onus* of proof (*ib.*)—General rule of construction where a particular class is spoken of and general words follow (p. 111)—General words refer to larger *genus* if particular words exhaust a whole *genus* (*ib.*)—A bequest of furniture and other movable goods includes money (*ib.*)—Meaning of “household” in a gift of household furniture and effects (*ib.*)—Words “heir and *malik*” as applied to a woman were construed by Privy Council in a restricted sense in *Mahomed Shumsool v. Shewukram* (pp. 111, 112)—On the other hand in *Lala Ramjeewan Lal v. Dal Koer* the word “Malik” as applied to a Hindu daughter was held to confer an absolute estate (p. 112)—The word “Dakhilar,” meaning of (*ib.*)—The intention to use the same words in different parts of the will in different senses must be strongly indicated (*ib.*)—But the same words applied to different subject-matter may bear a different meaning (*ib.*)—Technical words shall have their legal effects unless testator meant otherwise (p. 113)—A clear devise cannot be altered, modified or cut down except by clear words to that effect (*ib.*)—“For your maintenance” followed by an express power of alienation held to confer an absolute interest (*ib.*).

Rule 6. Where any word material to the full expression of the meaning has been omitted it may be supplied by the context.

Succession Act, s. 64 (p. 113)—Discretion of Court to supply words in a will (*ib.*)—Such cases are divided into two heads: (1) When the will is in itself capable of bearing any meaning unless some words are supplied; (2) Where there is a clear and precise gift and a contingent limitation over, which is clearly expressed, but is not commensurate with the previous gift like *Spalding v. Spalding*; or where there has been a defect as in *Spalding v. Spalding* and *Abbot v. Middleton* (pp. 113, 114)—Addition or rejection how made where contents of a will show that a word has been undesignedly omitted or undersignedly inserted (p. 114).

LECTURE VII.—WILLS—*contd.*

Rule 7. A wrong description does not avoid bequest.

Maxim, “*Falsa demonstratio non nocet*,” practically includes two maxims, “*Nihil facit error nominis cum de corpore constat*” and “*Veritas nominis tollit errorem demonstrationis*” (p. 115)—Succession Act, s. 63 ill. (a) (*ib.*)—A striking instance of “an error as to a name is nothing where there is certainty as to the person” (*ib.*)—Succession Act, s. 63, ills. (b) and (c) (p. 116)—A bequest to six grandchildren by name but one name was repeated and another was omitted held in favour of all the grandchildren in equal share (*ib.*)—Succession Act, s. 63, ill. (e) (*ib.*)—*Prima facie* the right name is to govern and the *falsa demonstratio* is not to take away the *veritas nominis* but construction must depend on facts of each particular case (*ib.*)—*Persona designata* defined (pp. 116, 117)—Wills Act, s. 33 (*ib.*)—A bequest to a class and to *personæ designatae* explained (*ib.*)—Property may be given to an illegitimate child *persona designata* but not as a child simply (*ib.*)—A bequest to adopted son by name is valid although adoption is as a matter invalid (*ib.*)—Succession Act, s. 65 (p. 118)—Ss. 63 and 65 of Succession Act compared (*ib.*)—Entirety expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of specific gift (*ib.*)—Where description is made up of more than one part, one is true and the other false ; if the true part describe the subject with sufficient legal certainty, the false part will be rejected and the devise will not be vitiated (*ib.*)—If the language is clear but does not fit owing to insertion of some words, the Court may reject the part that makes it inapplicable (p. 119)—Application of the doctrine of *False demonstration* (*ib.*)—Characteristic of cases within the rule (*ib.*)—Intention once found, erroneous description is treated as mere surplusage and rejected following the maxim “*utile per inutile non vitiatur*” (*ib.*).

Rule 8. If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be

considered as limited to such property, and it is not lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Succession Act, s. 66 (p. 119)—In judging whether a case falls within this rule any erroneous description liable to rejection under s. 65 of Succession Act is to be considered as struck out of the will (*ib.*)—Rule of construction where a given subject is devised and there are found two species of property (p. 120)—Where property exactly fits the description, the whole of that property and nothing more passes (*ib.*)—Lord Bacon's maxim "*Non accepi debent verba in demonstrationem falsam quæ competit in limitationem veram*" explained (*ib.*)—*Dictum* of Alderson, B. (*ib.*).

Rule 9. Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Succession Act, s. 68 (p. 120)—Mode of obtaining intention of the testator (*ib.*)—Only case where extrinsic evidence to show intention of the testator can be properly admitted (p. 121)—In case of equivocation evidence of previous intention to solve the latent ambiguity may be received (*ib.*)—Case in which the description in the will is applicable indifferently to, and correctly describes, more than one subject, the principle upon which they proved may be explained (*ib.*)—Averment to take away surplusage is good (p. 122)—Evidence only determines what subject was known to the testator by the name or other description be used (*ib.*)—Where a person has been fully described by name and description evidence to show that there is another person of the same not admissible (*ib.*)—In case of devise to a relation if there be two persons of the same name, one legitimate and the other illegitimate, the legitimate relation is to be preferred (*ib.*)—No equivocation arises where person or thing does not accurately answer the description (*ib.*).

Rule 10. Where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intention of the testator shall be admitted.

Succession Act, s. 68 (p. 122)—Where words of a will aided by light of material facts are not sufficient to determine testator's

intention, no evidence will be admissible to prove the same (pp. 122, 123)—In such cases the will is void for uncertainty (p. 123)—Judgment of a Court in expounding a will must be simply declaratory of what is in the will (*ib.*)—Test in expounding a will (*ib.*)—Extrinsic evidence was not admitted to prove intention of the testator in *Administrator-General vs Money* (*ib.*)

LECTURE VIII.—WILLS—*contd.*

Rule 11. If full effect cannot be given to the intention of the testator, effect is to be given to it as far as possible.

Succession Act, s. 74 (p. 124)—Illustration to this section is no guide to construe Hindu wills (*ib.*)—If the expressed intention of testator points to an illegal object, no effect can be given to that object (*ib.*)—Succession Act, s. 104, as to accumulation (*ib.*)—A trust for perpetual accumulation as regards wills of Hindus is void (*ib.*)—Direction to accumulation (a) invalid where inconsistent or repugnant to gift; (b) permissible with proper limitation (p. 125)—Remarks of Trevelyan, J., on the question of accumulation (*ib.*)—Lord Kenyon's expression as to the principle upon which this rule is based (p. 126)—Giving effect to general intent at the sacrifice of a particular intent should not be done without actual necessity (*ib.*)—General intention creating a known estate of inheritance ought to be effected (*ib.*)—An attempt to create an estate tail by Hindu is void (*ib.*)—Charities favoured in law (*ib.*)—Bequest in favour of individual and charity distinguished (pp. 126, 127)—Doctrine of *cy près* (p. 127)—In absence of general charitable intention if particular object cannot be answered, the next-of-kin will take (p. 128)—Doctrine of *cy près* applied in *Longbottam v. Satoor* (pp. 128, 129). Case where bequest to second Sadávarat not void for uncertainty (p. 129)—In *Morarji v. Nenbai* bequest to *dhurm* was held to be invalid but that to Sadávarat valid.

Rule 12. Where two clauses in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Succession Act, s. 75 (p. 130)—Maxim “*Cum duo inter se pugnantia reperiunter in testamento ultimum vatum est.* (*ib.*)—Where two clauses repugnant to each other are found in a will, the last prevails (*ib.*)—Reason of this to be found in the nature of a will: will being ambulatory and revocable during testator's life-time (*ib.*)—Subsequent will prevails over a prior will when the two wills are inconsistent to each other (*ib.*)—A codicil prevails over a bequest in

the will of which it is a codicil and a subsequent codicil prevails over a prior one (*ib.*)—In case of two devises in fee of the same property the devises take concurrently (*ib.*)—In *Ulrich v. Litchfield* both legatees may take together without any violence to the construction (pp. 130 131)—Rule laid down by Lord Coke as to gift of the same property to two different persons (p. 131)—Settled rule, however, that prior devise must not be disturbed further than is necessary to give effect to the posterior gratifying disposition (*ib.*)—A clear gift can only be altered or retracted by the most plain, unambiguous and unequivocal words (*ib.*).

Rule 13. A will or bequest not expressive of any definite intention is void for uncertainty.

Succession Act, s. 76 (p. 132)—Indulgence allowed to ignorant, unskilful and negligent testator (*ib.*)—Duty of judicial expositor in such wills (*ib.*)—Conjecture not permitted (*ib.*)—An heir is not to be disinherited unless by express words or necessary implication (*ib.*)—Execution of a trust shall be under the control of the Court (*ib.*)—To the validity of every disposition it is requisite that there be a definite subject and object (p. 132, 133)—Instances of bequests that are void for uncertainty (pp. 133, 134)—Devises held to be good following the maxim “*Id certum est quod certum reddi potest.*”

Rule 14. The description, contained in a will, of property the subject of the gift, shall, unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

Succession Act, s. 77 (p. 134)—Generic disposition (*ib.*)—Provision of the section includes after-acquired property unless contrary intention of the testator shown in his will (p. 135)—Wills Act, s. 24, effect of (*ib.*)—Will to be considered as made immediately before the testator's death (*ib.*)—Only exception to this is where testator refers to the date of the will as the point at which the *quantum* of property is to be ascertained (*ib.*)—Additions to property made between the date of the will and that of testator's death (*ib.*)—Specific gift may be invalidated for uncertainty (p. 136)—Where a testator devises a house by description and afterwards acquires another in the same place, the devise void for uncertainty unless ascertained by extrinsic evidence (*ib.*)—Effect of Statute not to be frittered away by catching at doubtful expressions for taking a case out of its operation (p. 137).

LECTURE IX.—WILLS—*contd.*

Rule 15. Where property is bequeathed to any person, he is entitled to the whole of the interest therein, unless it appears from the will that only a restricted interest was intended.

Succession Act, s. 82 (p. 138)—Estate bequeathed without express words of inheritance would carry an estate of inheritance according to Hindu Law (*ib.*)—If an imperfect description be added as a gift of inheritance an estate of inheritance would pass (*ib.*)—Gift in terms of an estate legally inheritable with superadded words restricting power of transfer would be rejected as repugnant (*ib.*)—S. 159 of Succession Act to be read with this Rule (*ib.*)—A devise of the usufruct of the land passes the land itself (pp. 138, 139)—Rule founded on feudal law (p. 139)—Bequest of rents and profits of an estate with no intention in will to pass the estate is void (*ib.*)—A devise does not pass an absolute estate where estate vested in trustees and income to be given as maintenance (*ib.*)—Case where direction in a will was held to confer only a life-estate on testator's son (*ib.*)—But a devise of movables in the same will was held to confer an absolute gift of property (pp. 139, 140)—Where property given to daughter and her son with express prohibition against alienation by daughter held to confer a life-estate on daughter with remainder to her son (p. 140)—But a bequest of specific share of estate with power of alienation was held to confer an absolute estate (*ib.*)—Decisions as regards devises of immovable property to Hindu widows (pp. 140—142)—Rules of construction stated in *Soorjeemoney Dassee v. Dinobundhoo Mullick* (p. 140)—In *Mahomed Shamsool v. Shewakram* a gift to the widow of testator's son with qualification that the widow and her daughter "are and shall be heir and malik" was held only to confer a life-estate on the widow (pp. 140, 141)—Privy Council on this point (p. 141)—Where a Hindu testator devised his real and personal estates and effects to her and her heirs and assigns for ever and appointed her sole executrix the devise was construed as conferring an absolute estate on the widow (*ib.*)—Statement in a document held to be testamentary document and devise to widow and her daughter

as maliks of his property held to confer an absolute estate (*ib.*)—Common rule of Hindu law as laid in *Koonj Behari Dhur v. Premchand Dutt* (pp. 141, 142)—In *Hari Lall v. Bai Reva*, where a widow was to take possession of and enjoy the property just as the testator, but the devise neither contained words of inheritance nor any direct power of disposition was given to her, the devise was held to confer only a life-estate (p. 142)—In *Lala Ramjewan Lall v. Dilkoer*, the word “Malik” passed an absolute estate to testator’s daughter, though without power of alienation (*ib.*)—S. 125 of Succession Act (*ib.*)

Rule 16. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Substitutional gifts—its object—its nature (p. 143)—Executory devise and substitutional gifts distinguished (*ib.*)—When the word “or” may be read as “and” (*ib.*)—When an estate of inheritance intended to be given is void beyond life of donee, and there is a gift over in a specified event for the void gift, such gift over is good (*ib.*)—Gift over in a Hindu will to a class some of whom incapable of taking the gift how to be construed (p. 144)—How to give effect to general and particular intention when particular intention fails (*ib.*)

Rule 17. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in this ordinary sense applicable shall take the legacy.

Succession Act, s. 85 (p. 144)—“A gift to a class” explained (*ib.*)—When a gift is said to be made to a class (pp. 144, 145)—A gift to “my children,” meaning of (p. 145)—A gift may be a gift to a class if though a particular individual named (*ib.*)—In a gift to a class an individual may be named by the testator by way of precaution (*ib.*)—Where gift to a class made in terms is a gift to a class simply, unless the number of persons constituting the class is stated (*ib.*)—Gift to a class and gift to individuals, explained (p. 146)—Period of distribution, meaning of (*ib.*)—When a gift is said to be immediate (*ib.*)—When a gift is said to be postponed (pp. 146, 147)

—*Prima facie* right to take under a specific gift made to each member of a class (p. 147).

Rule 18. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

Succession Act, s. 98 (p. 147)—Exception to this rule (*ib.*)—Class of persons standing in a particular degree of kindred to a specified individual to whom property bequeathed, but possession of it differed till a later time than the testator's death, the property will go to such of them as shall be then alive and to the representatives of any of them who have died since testator's death (*ib.*)—Opinion of Pontifex, J., in *Maseyk v. Ferguson* (pp. 147—149)—Intention of Legislature in framing s. 98 of Succession Act (p. 148)—Child of testator's brother born before the period of distribution is entitled to participate as a member of the class (*ib.*)—Persons who are excluded from participating (p. 149)—First part of the rule, explained (*ib.*)—Second part of the rule, explained (p. 150)—Where a gift is partly immediate and partly postponed, it should be regarded as immediate (*ib.*).

Rule 19. Where two legacies are made to the same persons in a will or a codicil, unless a contrary intention is shown, if the legacies are of the same specific thing, he is entitled to receive that specific thing only ; if the legacies are of the same amount or quantity of a thing, he is entitled to one such legacy only ; and if the legacies are of unequal amounts or of different specific things, he is entitled to both.

Corollary—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Succession Act, s. 88 (p. 151)—The word “will” does not include a codicil for the purposes of this rule (*ib.*)—S. 88 deals with cumulative legacies (*ib.*)—Principles on which it is based (*ib.*)—(a) When the specific thing is given twice it is one gift (*ib.*)—(b) Presumption where the legacies are given by different writings (*ib.*)—(c) Presumption where legacies of the same amount are given by the same document (pp. 151, 152)—Maxim “*en necessitate rei*” (p. 151)—Double gift of the same specific thing (p. 152)—Legacies of equal amount given by the same instrument, though merely

repetitions, there may be an intention to give both (*ib.*)—An instance for the same (pp. 152, 153)—Bequest to the same individual by two different codicil to the same will, second bequest was treated as cumulative and held that he was entitled to take both (p. 153)—But legacies by a subsequent instrument described by testator to be last will and testament have been meant to be substitutional and not cumulative (*ib.*)—So also a legacy by a third codicil with words “not having time to alter my will and to guard against any risk,” held to be a substitutional one and not cumulative (*ib.*)—A legacy given by two codicils executed at the same time and in the presence of, and attested by the same witnesses, and with same provisions : held to be substitutional and not cumulative (pp. 153, 154)—Such is the case where later gift is merely explanatory of the former one (p. 154)—In case of double coincidence, repetition and not accumulation was intended (*ib.*)—Will must contain testator's motive and not merely a description (*ib.*)—The term “Servant” is merely descriptive in the case of gifts of equal amount to a “servant” (*ib.*)

Rule 20. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Succession Act, s. 89, ill. *a* (p. 154)—To constitute a residuary legatee particular mode of expression is not necessary (*ib.*)—Only testator's intention requisite (*ib.*)—Implication impossible when there is no certainty as to person or as to estate (*ib.*)—Reasonable degree of certainty is necessary for implication of gift (p. 155)—“Surplus” and “residue,” meaning of (*ib.*)—Words in will that are held to create a general residuary bequest (*ib.*)—Stipulation in a will where property so dedicated passed under the residuary devise (*ib.*)—Right of residuary legatee nominated generally (*ib.*)—What is carried by a residuary bequest of personal estate (*ib.*)—“A residuary clause poses a lapsed legacy” on what this general rule is founded (p. 156).

Rule 21. If a legatee does not survive the testator, unless a contrary intention appears in the will, the legacy lapses and forms part of the residue, unless such legacy comprises a portion or the whole of the residuary estate, in which case the share comprised in the legacy goes as undisposed of.

Succession Act, ss. 92, 95 (p. 156)—Requisites on the part of testator to prevent a legacy from lapsing (*ib.*)—A devise that was

held not to prevent the bequest to one of the residuary legatees who died in testator's life-time lapses (*ib.*)—A will that designs to prevent the lapsing of a legacy must be specially penned (*ib.*)—Proof necessary to entitle a representative of the legatee to receive the legacy (p. 157)—Succession Act, s. 92, ill. *f* (*ib.*)—No presumption of law arising from age or sex as to survivorship among persons died at one and the same time (*ib.*)—*Onus* of proof (*ib.*)—Exception to the rule of lapse: (a) Gifts to a class (p. 157); (b) Substitutional gifts (p. 158); (c) Bequest to legatees as joint tenants (pp. 158—160)—Tenancy-in-common (p. 160); and (d) Bequests to any child or other lineal descendant of the testator who dies in testator's life-time, but leaves a lineal descendant surviving the testator (pp. 161, 162)—S. 96 of Succession Act and s. 33 of Wills Act in England compared (p. 162)—The effect of the section (*ib.*)—The words of the section point at no particular period of death within testator's life-time (p. 163)—The words "shall die" speak from the death of the testator (*ib.*)—Requisites to prevent the lapse of a legacy to a legatee, being a child or other issue who died at the testator's life-time (*ib.*)

LECTURE X.—WILLS—*concl'd.*

Rule 22. If a legacy be given in general terms without specifying the time when it is to be given the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives.

Succession Act, s. 91 (p. 164)—Law favours the vesting of estates (*ib.*)—Time when the property which is the subject of disposition will belong to the object of gift (*ib.*)—Devise or bequest in favour of a person *in esse* simply confers an immediately vested interest (*ib.*)—Effect of introducing words of futurity into the gift (*ib.*)—General rule of construing where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate (pp. 164, 165)—Rule illustrated (p. 165)—Estates devised are held to be vested (*ib.*)—Rule for guidance of the Courts of Westminster in construing devises (*ib.*)—Effect of “if” and “when” upon titles of estates (*ib.*)—Extent of meaning of the words “to be paid” in s. 91 of Succession Act when s. 91 is read with s. 106 of the Act (p. 166).

Rule 23. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed aright to receive it at the proper time, shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death.

Succession Act, s. 106 (p. 166)—Transfer of Property Act, s. 19 (*ib.*)—Estates and interest in property (1) vested in possession; (2) Vested in interest but not in possession; (3) Contingent; and (4) Conditional (pp. 166, 167)—Succession Act, s. 118 (p. 167)—When an estate once vested will not be divested (*ib.*)—But on the happening of events that are to precede the vesting of substituted devise vested estate will be divested (*ib.*)—Events include the personal qualification of the substituted devisee (*ib.*)—Cases illustrated (*ib.*)—Succession Act, s. 119 (*ib.*)—Succession Act, s. 118, ill. *d* (*ib.*)—The substituted devisee must be in existence at the testator's death

as far as Hindu law is concerned (p. 168)—Succession Act, s. 120 (*ib.*)—Succession Act, s. 111 (*ib.*)—Succession Act, s. 107 (*ib.*)—Effect of legacy if no time fixed for the specified uncertain event (*ib.*)—An estate vested but subject to be divested on the happening of a specified event and a contingent estate distinguished (pp. 168, 169)—Onerous bequest—Succession Act, ss. 109, 110 (p. 169)—Condition considered to have been fulfilled if it has been substantially complied with s. 115 (*ib.*)—Presumption may be rebutted if the will manifest a sufficient intention to the contrary (*ib.*)—Principle illustrated (p. 170)—Consent to a marriage refers to first marriage and condition does not extend to second marriage (*ib.*)—Conditional bequest must not be impossible; Succession Act, s. 113 (*ib.*)—Or it must not be contrary to law or morality: Succession Act, s. 114 (*ib.*)

Rule. 24. When a legacy is bequeathed absolutely to, or for the benefit of, any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the legacy as if the will had contained no such direction.

Succession Act, s. 125 (p. 170)—Word “fund” used in that section—but the rule must obviously refer to all classes of legacies (pp. 170, 171)—Right of donee to claim the gift without applying it to the specified purpose where the purpose of the gift is the benefit solely of the donee himself (p. 171)—Cases to the effect (*ib.*)—Court not to compel that to be done which the legatee may undo the next moment (*ib.*)—A bequest of money to be laid out in planting trees held to be primarily for the benefit of the owners (*ib.*)—In *Bai Bapi v. Jamnadas*, the bequest came within provisions of s. 125 of Succession Act, and the widow was entitled absolutely to the bequest (p. 172)—In *In re Elliott*, where a bequest was made to the plaintiff subject to payment of certain debts and appointing her executrix made certain directions: *held* that direction to pay legacies imposed no obligation on plaintiff to sell, and that directions are repugnant and void, and that property belonged to plaintiff absolutely (*ib.*).

Precatory Trusts (p. 172)—Rules with regard to them (pp. 173, 175)—Rules laid down by Wood, V. C., in *Cattlin v. Brown* (pp. 175, 176)—Doctrine of Precatory Trust not to be extended (pp. 176—178)—Reason for the same (p. 177)—A devise over including two contingency may be divided though included in one expression

(p. 178)—A recital in will establishing perpetuity not allowable in law does not invalidate subsequent trust (*ib.*)—Restriction as to power of accumulation: s. 104 of Succession Act and English law compared (*ib.*)—Object of s. 105 of Succession Act (pp. 178, 179)—Table of Consanguinity: s. 24 of Succession Act (p. 179)—Charity, definition of (*ib.*)—Applicability of ss. 78-81, 84, 86 and 87 of Succession Act to those governed by Hindu Wills Act or Oudh Estates Act (pp. 179, 180).

LECTURE XI.

STATUTES.

Statutes, definition of (p. 181)—Its functions (*ib.*)—Province of Legislature in enacting Statute (*ib.*)—Duty of Courts as regards Statutes (*ib.*)—Province of Legislature and Judges distinguished (pp. 181, 182)—Classes of Statutes (p. 182)—General and special Statutes, defined (*ib.*)—Remedial and Penal Statutes, defined (*ib.*)—Statutes *in Pari Materia*, defined (pp. 182, 183)—Temporary Statutes, defined (p. 183)—Division of law by Bentham (*ib.*)—Definition of Substantive and Adjective Law (*ib.*)—Statute is the will of Legislature (*ib.*)—Statutes to be expounded according to the intent of them that made it (*ib.*)—Object of interpretation (*ib.*)—Task when intention is expressed and when not (*ib.*)—General heads of the subject of interpretation of Statutes (p. 184)—Power of Governor-General to make Laws and Regulations (*ib.*).

Rule 1. All legislation is *prima facie* territorial.

Who are bound by legislation (pp. 184, 185)—Extent of territorial jurisdiction (p. 185)—In personal action a decree pronounced *in absentia* by a foreign Court is an absolute nullity (p. 186)—Jurisdiction of Court upon non-resident foreigner (pp. 186, 187)—General presumption is that the Legislature does not intend to exceed its jurisdiction, Statutes are not intended to do that which is against the comity of nations (p. 187)—Intention of Legislature should be expressed with irresistible clearness (*ib.*)—Act of Imperial Parliament limits the power of the Indian Legislature (pp. 187, 188).

Rule 2. A Statute ought to be so interpreted that if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.

Words of a Statute must be construed so as to give a sensible meaning to them (p. 188)—General rule for the construction of Acts of Parliament (*ib.*)—Act of Parliament how construed when intention of the Legislature is not clear and when it is clear (pp. 188,

189)—Rule of law upon construction of all Statutes whether penal or remedial (p. 189)—Presumption is for simple and literal construction of words, but literal construction ought not to prevail if opposed to intention of the Legislature (*ib.*)—Technical and popular meaning of words and phrases how assumed (pp. 189, 190)—The words “beyond the seas” are synonymous in legal import with the words “out of the realm,” “out of the land,” or “out of the territories” in Statute of Limitation (p. 190).

Rule 3. When the language is plain and unambiguous and admits of one meaning only, that meaning and that meaning alone, must be given to it.

Interpretation not allowable where no need (p. 190)—Maxim “*Absoluta sententia expositum non eget*” (*ib.*)—Legislature must be intended to mean what it has plainly expressed (*ib.*)—If Legislature enact anything in a language clear, unequivocal and capable of only one meaning, it must be enforced even though it be absurd or mischievous (*ib.*)—However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect (p. 191)—Duty of Court is not to make the law reasonable but to expound it as it stands (*ib.*)—Words may be modified or varied where their import is doubtful or obscure (pp. 191, 192)—General object of legislature or the meaning of its language how determined (p. 192)—Intention of the legislature how to be ascertained (*ib.*)—Exception to Rule 3 (p. 193)—Statutes are to be construed not according to their mere letter, but the intention and object with which they were made (pp. 193, 194)—Equity, definition of (p. 195).

Rule 4. Words in a statute are to be read with reference to the subject-matter they refer to and are controlled by the context.

Right of Court to depart from the intention of the legislature as appearing from the words used (p. 195)—But where two constructions open, more reasonable of two may be adopted (*ib.*)—Any construction would be rejected to avoid injustice and absurdity, unless the policy and object of the Act required (p. 196)—In some cases the word “must” or “shall” may be substituted for the word “may” to give effect to the intention of the legislature (*ib.*)—The construction and meaning given by the Privy Council to ss. 20 and 21 of Act XIV of 1859; and to Charter of Bombay High Court (pp. 196—198)—

Steps to arrive at the real meaning as laid down by Lord Coke (p. 198)—A manifest inaccuracy should be eliminated and true intention of the legislature should be followed (pp. 198, 199).

Rule 5. General provisions in the same Statute or other Statutes are not to control or repeal the special provisions. The special provisions are to be read as excepted out of the general provisions.

Case that falls within the special provision must be governed thereby and not by the terms of the general provision (p. 199)—This rule provides the only way of reconciling general and special Statutes (*ib.*)—Where the provisions in a special Act are inconsistent with the provisions of a prior general Act; the provisions of the general Act must yield to those of the special Act (p. 200)—A general later law does not abrogate an earlier special one by mere implication (*ib.*)—Maxim “*Generalia specialibus non derogant*” (*ib.*)—General Statute is read as silently excluding from its operation the cases which have been provided for by the special one (p. 201).

LECTURE XII.—STATUTES—concl.

Division of a Statute in five parts (p. 202)—Marginal notes to sections do not form part of an Act (*ib.*)—Title, importance of (pp. 202 203)—Preamble is a recital of some inconvenience (*ib.*)—Proper function of preamble (*ib.*)—Interpretation-clause, importance of (*ib.*).

Rule 6. Where the enacting part is unambiguous, the preamble cannot be resorted to control it; but where it is ambiguous the preamble can be resorted to explain it.

Language of the sections of a Statute being clear, preamble cannot be resorted to restrict the operation (p. 203)—Preamble to a Statute, purpose of framing a (pp. 203, 204)—Where intention of legislature declared by preamble, effect is to be given to it to this extent (p. 204).—Where object or meaning of an enactment is ambiguous, preamble is a good guide to find out the meaning (*ib.*)—Preamble is a key to open the understanding of the enactment (*ib.*).

Rule 7. An interpretation-clause should be used for the purpose of interpreting words which are ambiguous or equivocal and not so as to disturb the meaning of words which are plain.

Object of an interpretation-clause is to get a uniform and consistent interpretation of many words appearing in various Acts in order that system of laws should harmonize as a whole (p. 205)—Effect where interpretation-clause extends the meaning of a word (*ib.*)—Sometimes a term may be defined as *ex abundanti cautela* (*ib.*)—Interpretation-clause is not to be taken as substituting one set of words for another (*ib.*)—Extended meaning given to a word by interpretation-clause does not follow it if the same word be used more than once in the Act (p. 206).

Rule 8. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.

Schedule as a rule generally appended to an Act for the sake of convenience (p. 206).—Forms in Schedule are inserted merely as B, DWS. d

examples, and are only to be followed implicitly so far as the convenience of each case may admit (*ib.*).

Rule 9. When the language of a Statute is ambiguous, the Court is entitled to take into consideration—(1) What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy the Legislature has appointed; and (4) the reason of the remedy.

Remark of Halsbury, L. C., as regards the Rule 9 in *Eastman v. The Comptroller-General* (pp. 207, 208)—This rule (9) is analogous to the rules relating to deeds and wills that the interpreter should so far put himself in the position of those whose words he is interpreting so as to be able to see what those words relate to (p. 208)—Mode in which Consolidating Acts and Acts intended to codify a particular branch of the law are to be construed (*ib.*)—Remark of Lord Halsbury, L. C., in *Vagliano v. Bank of England* (*ib.*)—Remark of Lord Harschell in the same case (pp. 208, 209)—Object of consolidation is to collect the statutory law and to bring it down to date (p. 209)—Proceedings of Legislature are not legitimate aids in construing the Act (p. 210)—Such proceedings include Reports of Indian Law commissioners, proceedings of the L. C., Reports of Select Committees of the L. C., draft stage of the Bill, and statements of objects and reasons attached to Bill (*ib.*)

Rule 10. Remedial Statutes must be construed liberally and Penal Statutes strictly; and in each case when the meaning is doubtful in the manner most favourable to the liberties of the subject.

Remedial Acts, definition of (p. 210)—Statutes extending the franchise, taking away penalties, etc., are to be liberally construed (*ib.*)—What is liberal construction of a Statute (pp. 210, 211)—Settled rule of construction in expounding remedial laws (p. 211)—Penal Statutes, extent of (pp. 211, 212)—Some Remedial Statutes are partly penal (p. 212)—Nothing to be regarded as within the meaning of a Penal Statute, which is not within the letter (*ib.*)—But where a Statute imposes a duty, it without express words gives an action (p. 213)—Difference between cases where Court or its officers omits to do what is intended by Statute to be done and those where they do what is not intended by Statute (p. 214).

Rule 11. Statutes are *prima facie* deemed to be prospective only.

General rule of construing Statutes as laid down in Bac. Abr., 439 "Statute C" (pp. 214, 215)—Rights already acquired not to be affected by retrospective action of a new law (p. 215)—General rule regarding procedure (*ib.*).

Rule 12. A Statute is not to be held to be repealed by implication unless the repugnancy between the new provision and the former Statute be plain and unavoidable.

Repeal must, if not express, flow from necessary implication (p. 216)—Clause of repeal necessary to repeal positive provisions of a former Statute (*ib.*)—Subsequent affirmative general enactment cannot repeal special enactment by implication (*ib.*)—Act of Parliament cannot be repealed by non-user (*ib.*).

Rule 13. Where a Statute creates an obligation, and enforces the performance in a specified manner, it is a general rule that performance cannot be enforced in any other manner. But if an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

Classes of liabilities founded upon Statute (p. 217)—Remedy provided by Statute must be followed (p. 218)—Form given by Statute must be adopted and adhered to (*ib.*)—Principle stated by Lord Tenterden in *Doe v. Bridges* as to remedy (*ib.*)—Distinction between a Statute creating a new offence and a Statute enlarging the ambit of an existing offence (p. 219)—Subsequent Acts adding accumulative penalties do not repeal former Statutes (p. 220).

Rule 14. Where the same offence is re-enacted with a different punishment the prior enactment is repealed.

There may be two remedies of the same Act, but they must be of a different nature (p. 220)—Where act or omission constitutes an offence under two or more enactments how punishable (p. 221).

Rule 15. A repealed Statute is considered as if it had never existed except as to transactions passed and closed taken under it.

Effect of repealing a Statute (p. 221)—When an Act repealing, in whole or in part, a former Act, is itself repealed, what effect follows (*ib.*)—Validity of contract which was illegal under a Statute when entered into, if that Statute be repealed afterwards (p. 222)—Right once acquired under a Statute cannot be taken away if that Statute be repealed (*ib.*)—And also it is not augmented (*ib.*).

TABLE OF CASES CITED.

A.	Page.
Abbott <i>v.</i> Middleton, 7 H. L. C., 68, 114 ; Jur. N. S., 1126	4, 21, 108, 114
Abdul Fata Mahomed <i>v.</i> Russomoy Dhur Chowdhry, 22	
I. A., 76 ; 22 Cal., 619 124, 210	
Abdulla <i>v.</i> Mohon Gir, 11 All., 490 184	
Abley <i>v.</i> Dal, 11 C. B., 391 192	
Adams and Kensington Vestry, <i>In re</i> , 27 Ch. D., 253 173	
Admr.-Genl. <i>v.</i> Apear, 3 Cal., 553 172	
Admr.-Genl. <i>v.</i> Lazar, 4 Mad., 244 172	
Admr.-Genl. <i>v.</i> Money, 15 Mad., 448 123, 147	
Admr.-General of Bengal <i>v.</i> Prem Lall Mullick, 22 M. I. A.,	
107 ; 22 Cal., 788 36	
Airmy <i>v.</i> Bower, 12 Ap. Cas., 263 179	
Ajudhia <i>v.</i> Nand Lal, 15 All., 318... 23	
Akhoy Chunder <i>v.</i> Kalapabar, 12 Cal., 403 ; 12 I. A., 198... 108	
Alagaiya <i>v.</i> Saminada, 1 M. H. C. R., 264 62	
Aldons <i>v.</i> Cornwell, L. R., 3 Q. B., 573 ; 9 B. and S., 607 89	
Allen, <i>In re</i> , 29 W. R., 480 145	
Allen <i>v.</i> Callow, 3 Ves., 289 152	
Allen <i>v.</i> Pink, 4 M. & W., 140 49	
Amirthayyan <i>v.</i> Ketharamayyan, 14 Mad., 65 109, 130	
Amritalal Dutt <i>v.</i> Sarnamoyi Dasi, 1 C. W. N., 345 ; 24	
Cal., 589 125	
Anand Chunder Pal <i>v.</i> Panchilall Surma, 14 W. R., 36,	
F. B. ; 5 B. L. R., 691 17	
Anandrao Vinayak <i>v.</i> Administrator-General, 20 Bom., 450	
... 8, 139, 140, 155, 168	
Anangamonjori Debi <i>v.</i> Sonamoni Debi, 8 Cal., 157 ... 8, 9, 174	
Anantha <i>v.</i> Nagamuthu, 4 Mad., 200 171	

	<i>Page.</i>
Anchtertonie <i>v.</i> Bill, 4 M. H. C. R., 77	... 103
Anderson <i>v.</i> Anderson, 1 Q. B., 749	... 110
Anderson <i>v.</i> Martindale, 1 East., 500	... 98
Andros, <i>In re</i> , 24 Ch. D., 637	... 107
Anna Gurubala <i>v.</i> Kristnaswami, 1 M. H. C. R., 189	... 53
Anupchand <i>v.</i> Champs, 12 Bom., 585	... 51
Applebee, <i>In re</i> , 3 Ch., 422	... 173
Apruce <i>v.</i> Apruce, 1 V. & B., 364	... 171
Arrowsmith's Trust, <i>In re</i> , 8 W. R., 555; 2 D. F. & J., 474	... 12
Arumugam <i>v.</i> Ammi, 1 M. H. C. R., 400	... 108
Ashutosh Dutt <i>v.</i> Doorgachurn Chatterjee, 6 I. A., 182; 5 Cal., 438; 5 C. L. R., 296	... 155
Asmaida Koer's Case, 11 I. A., 164; 6 All., 560	... 81
Aspden <i>v.</i> Seddon, L. R., 10 Ch., 394; 44 L. J. Ch., 359	... 42
Aspdin <i>v.</i> Austin, 5 A. & E., 684	... 87
Att.-Genl. <i>v.</i> Ashbourne Recreation Ground, 1 Ch., 106; 72 C. J. Ch., 69	... 218
Att.-Genl. <i>v.</i> Great Eastern Railway Co., L. R., 6 H. L., 367	... 19
Att.-Genl. <i>v.</i> Lamplough, 3 Ex. D., 229	... 206, 221
Att.-Genl. <i>v.</i> Luckwood, 9 M. & W., 378	... 189
Att.-Genl. <i>v.</i> Margate Pier and Harbour, 1 Ch., 754	... 202
Ayton <i>v.</i> Ayton, 1 Cox., 327	... 149

B.

Baboo Dhunput Sing <i>v.</i> Shaikh Jowahur Ali, 4 W. R., 152	52
Baboo Kooldebnarain Shahu <i>v.</i> Mussamut Wooman, Marsh, 357; 2 Hay, 370	... 158
Baboo Lall <i>v.</i> Joy Lall, 24 Cal., 533	... 51
Bachman <i>v.</i> Bachman, 6 All., 583...	... 166
Bai Bapi <i>v.</i> Jamnadas, 22 Bom., 774	... 172
Bai Mativahoo <i>v.</i> Bai Mamoobai, 24 I. A., 93	... 144
Bakshu Lakshman <i>v.</i> Govinda Kanji, 4 Bom., 594	51, 58, 59
Balkaran Rai <i>v.</i> Gobinda Nath, 12 All., 137	... 26, 27, 193
Balkrishna <i>v.</i> Bapu, 19 Bom., 206	... 215
Ballin <i>v.</i> Ballin, 7 Cal., 224; 9 C. L. R., 28	... 16, 112
Bama Soondaree Dossee <i>v.</i> Verner, 13 B. L. R., 193	23, 189

	Page.
Bamford <i>v.</i> Chadwick, 2 W. R., 531	... 112
Banapa <i>v.</i> Sundar Das, 1 Bom., 333	... 48, 51
Barber <i>v.</i> Barber, 3 Myl. & C., 688	... 146
Barclay <i>v.</i> Wainright, 3 Ves. Jun., 462	... 152
Barlow <i>v.</i> Grant, 1 Vern., 255	... 171
Barratt <i>v.</i> Wyatt, 30 Beav., 443	... 83
Bartlett <i>v.</i> Gibbs, 5 M. & G., 96	... 206
Barton <i>v.</i> Fitzgerald, 15 East., 541	... 7, 95
Bassett's Estate, <i>In re</i> , 14 Eq., 54	... 154
Bath and Montague's Case, 2 Ca. Ch., 101	... 81
Bechar <i>v.</i> P. Decruz, 19 Bom., 770	... 131
Behari Lall Dey <i>v.</i> Kamini Sundari, 14 W. R., 319	... 49
Behari Lall Doss <i>v.</i> Tej Narain, 10 Cal., 764	... 99
Bell <i>v.</i> Ingestre, 12 Q. B., 317	... 53
Bell <i>v.</i> The Municipal Commissioner, 25 Mad., 457	... 188
Benyon <i>v.</i> Benyon, 17 Ves. Jun., 34	... 154
Bethune Hospital, <i>Re</i> , 19 Eq., 459	... 29
Bhagwan Sahai <i>v.</i> Bhagwan Din, 17 I. A., 18 ; 12 All., 387	... 62
Bhobatarini Debya <i>v.</i> Peary Lall Sanyal, 24 Cal., 646 ; 1 C. W. N., 578	... 160
Bholanath <i>v.</i> Kalipersad, 8 B. L. R., 89	... 49
Bhoobun Mohini Debya <i>v.</i> Hurrish Chunder, 4 Cal., 23 ; 5 I. A., 138 ; 2 C. L. R., 339	... 108
Biffen <i>v.</i> Yorks, 6 Scott, N. R., 235	... 181
Bireswar <i>v.</i> Ardhar, 19 I. A., 101 ; 19 Cal., 452	... 117
Birk <i>v.</i> Allison, 13 C. B. N. S., 12	... 188
Bissonath Chunder <i>v.</i> Sreemutty Bama Soondary Dassee, 12 M. I. A., 41	... 168
Black <i>v.</i> Jobbing, L. R., 1 P. & D., 685	... 106
Blamire <i>v.</i> Gildart, 16 Ves., 31	... 12
Blann <i>v.</i> Bell, 2 D. M. & G., 781	... 139
Boehm, <i>In the goods of</i> , L. R. P., 247	... 116
Bottomby's Case, 16 Ch. D., 686	... 24
Bowes, <i>In re</i> , 1 Ch., 507	... 171
Bowman <i>v.</i> Taylor, 2 A. & E., 278	... 85
Boyd <i>v.</i> Petrie, 7 Ch., 385	... 82
Boys <i>v.</i> Morgan, 9 Sim., 289	... 154

	Page.
Brahmaputra Tea Co. v. Scarth, 11 Cal., 545 ...	103
Britt v. Robinson, L. R., 5 C. P. ...	213
Brooke v. Haymes, L. R., 6 Eq., 25	86
Brown v. Higgs, 4 Ves., 708 ; 5 Ves., 495 ; 8 Ves., 561 ...	144, 180
Browne v. Burton, 5 Dow and Lound, 292 ; 17 L. J. N. S. Q. B., 50	50
Browne v. Hope, 14 Eq., 343	156
Browning v. Wright, 2 Bos. & P., 13	40, 45, 95, 102
Buckland v. Buckland, 2 Ch., 534 ...	93
Bullen v. Denning, 5 B. & C., 842 ; 8 D. & R., 657 ; 29 R. R., 431	96
Bullubhdas v. Thucker, 14 Bom., 360	139
Bungsheedhur v. Sheik Mahomed, 1 Hay, 369	215
Burdet, <i>In re</i> , 20 Q. B. D., 314 ; 57 L. J. Q. B., 118	80
Burkinshaw v. Hodge, 22 W. R. (Eng.), 484	153
Burrough v. Phileox, 4 Myl. & C., 92	144
Buzdoor Raheem v. Shumsoonissa Begum, 11 M. I. A., 604 ; 8 W. R., 12	25, 182, 192
Byrn v. Godfrey, 4 Ves., 5	173

C.

Caledonian Ry. Co. v. North British, 6 B. L. R., App. Cas., 114	23, 189
Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry, 8 Cal., 378	8, 125, 147, 175
Cambridge v. Rouse, 8 Ves. Jun., 12	156
Camoys v. Blundell, 1 H. L. C., 778	115
Cargey v. Thomas, 2 B. & C., 170 ...	36
Carlisle v. Ricknauth, 8 Cal., 809 ..	103
Carpenter v. Buller, 8 M. & W., 212	86
Cartwright v. Cartwright, 3 DeG. M. N. G., 982	168
Cattlin v. Brown, 11 Hare, 372	175
Chester v. Willan, 2 Wms. Saund., 96	79
Chinna Aiyan v. Mahomed, 2 M. H. C. R., 322	304
Christa Charla v. Karihasayya, 9 Mad., 399	89
Christopher v. Lotinga, 33 L. J. C. P., 123	23
Churaman v. Balli, 9 All., 591	79

	Page.
Clark's Trust, <i>In re</i> , L. R., 9 Eq., 378 ...	... 168
Clegg v. Hands, 44 Ch. D., 503 ; 59 L. J. Ch., 477	... 102
Cohen v. Bank of Bengal, 2 All., 598 ...	... 48
Coleman, <i>Re</i> , L. R., 4 Ch. D., 165* ...	... 149
Coles v. Hume, 8 B. & C., 574 ...	... 6
Cooke v. Vogeler, A. G., 107 ...	... 192
Cooper v. Whittingham, 15 Ch. D., 506 ; 49 L. J. Ch., 755 ...	... 219
Corbett, <i>Ex parte</i> , 14 C. D., 129 ...	... 17, 196
Corbyn v. French, 4 Ves. Jun., 418 ...	... 157
Countess of Rothess v. Kircaldy Waterworks, 7 App. Cas., 694 ...	... 195
Cowasji v. Burjorji, 12 Bom., 335 ...	... 48, 53
Cowen v. Truefitt, 2 Ch., 309 ...	... 118, 119
Crawford v. Spooner, 4 M. I. A., 187 ...	... 5, 26
Crompton v. Jarratt, 30 Ch. D., 307 ...	... 84
Crooke v. DeVandes, 9 Ves., 197 ...	... 158
Cursandas v. Vandravandas, 14 Bom., 482 ...	... 134
Curtis v. Storin, 22 Q. B. D., 507 ...	... 8, 13, 188
Cuthbert v. Lempriere, 3 Man. & S., 158 ...	... 12
Cutts v. Brown, 6 Cal., 328 ...	... 49, 51

D.

Dada Honaji v. Babaji, 2 B. H. C. R., 38 ...	... 54
Daimodee Paik v. Kaim Tarida, 5 Cal., 300 ...	... 58
Damodardas v. Dayabhai, 25 I. A., 126 ; 22 Bom., 833 ; 2 C. W. N., 417 ...	... 138
Davis v. Jones, 17 C. B., 625 ...	... 53
Dawson v. Oliver Massey, L. R., 2 Ch. D., 753 ...	... 170
Dean v. Green, 8 P. D., 39 ...	... 206
Delhi and London Bank v. Orchard, 3 Cal., 57 ; 4 I. A., 135 ...	... 18, 197
Devshankar v. Motiram, 18 Bom., 136 ...	... 134
Dheraj v. Hurdeo, 18 W. R., 122 ...	... 10
Doe v. Westlake, 4 B. & Ald., 57 ...	... 122
Doe d. Bean v. Halley, 8 T. R., 5 ...	... 126
Doe d. Brodbelt v. Thompson, 12 M. P. C. C., 127 ...	... 4
Doe d. Garnons v. Knight, 5 B. & C., 671 ...	... 46

	<i>Page.</i>
Doe d. George Gord <i>v.</i> Needs, 2 M. & W., 129	... 121
Doe d. Snape <i>v.</i> Nevill, 11 Q. B., 466	... 12
Doglioni <i>v.</i> Crispin, L. R., 1 H. L., 301	... 106
Doolubdas <i>v.</i> Ramlall, 5 M. I. A., 126	... 215
Dore <i>v.</i> Gray, 2 T. R., 365	... 216
Dover Gas Co. <i>v.</i> Mayor of Dover, 7 DeG. M. & G., 555	... 211
Dowson <i>v.</i> Sweet, 1 Amb., 175	... 115
Drake <i>v.</i> Drake, 8 H. L. C., 172	... 22
Drake <i>v.</i> Munday, Cro. Car., 207 ; W. Jo., 231	... 79
Drydon <i>v.</i> Overseers of Putney, 1 Ex. D., 232	... 18
Duffield <i>v.</i> Duffield, 3 Bli. N. S., 260 ; 1 D. & C., 268	165, 169
Dukhi Mollah <i>v.</i> Holway, 23 Cal., 55	... 202
Dullabh <i>v.</i> Hope, 8 Bom. H. C. R., 217	... 213
Dwarkanath Bysack <i>v.</i> Burroda Persaud Bysack, 4 Cal., 443 ; 1 C. I. R., 566	... 134, 155, 156

E.

Earl of Cardigan <i>v.</i> Armitage, 2 B. & C., 197 ; 3 D. & R., 414 ; 26 R. R., 313	... 96
Eastern Countries, &c. <i>v.</i> Marriage, 9 H. L. C., 36	23, 189
Eastman <i>v.</i> Comptroller of Patent, A. C., 573...	198, 207
Easum <i>v.</i> Appleford, 5 M. & Cr., 56	... 156
Ebrahim <i>v.</i> Cursetji, 11 Bom., 644	... 48, 53
Elliot, <i>In re</i> , 2 Ch., 353	... 172
Elliot <i>v.</i> Davenport, 1 P. Wms., 85	... 156
Elliot <i>v.</i> North-Eastern Ry. Co., 10 H. L. C., 333	... 90
Elliot <i>v.</i> Smith, L. R., 22 Ch. D., 237	... 157
Ellokassee Dassee <i>v.</i> Durpnarain Bysack, 5 Cal., 59	... 168
Emp. <i>v.</i> Kola Lalang, 8 Cal., 216	... 213
Empson's Case, <i>In re</i> , L. R., 6 Eq., 597	... 86
Enohin <i>v.</i> Wylie, 10 H. L. C., 1	... 106
Esan Chunder Ghose <i>v.</i> Protab Chunder Roy, 20 W. R., 224	... 67
Eshoor <i>v.</i> Venkatasubba, 17 Mad., 480	... 51
Everett <i>v.</i> Everett, 7 Ch. D., 433	... 137
Evers <i>v.</i> Challis, 7 H. L. C., 531	... 177, 178
Eyston <i>v.</i> Studd, Plewd., 465	... 27

F.

Fanindra Kumar Mitter <i>v.</i> Admir.-Genl. of Bengal, 6 C. W. N., 321	...	...	...	...	127
Fell <i>v.</i> Biddulph, I. R., 10 C. P., 701	...	...	...	...	149
Fenwick <i>v.</i> Schmalz, L. R., 3 C. P., 313	...	...	...	...	111
Fielding <i>v.</i> Morley Corporation, 1 Ch., 3	...	...	...	...	202
Fish Ingram <i>v.</i> Rayner, 2 Ch., 83	..	...	...	...	122
Fisher <i>v.</i> Prince, 2 Bur., 136	..	...	...	...	2
Fitzmaurice <i>v.</i> Bayley, 9 H. L. C., 99	...	...	...	...	90
Ford <i>v.</i> Barley, 17 Beav., 303	...	...	...	...	171
Ford <i>v.</i> Buch., 11 Q. B., 852 ; 17 L. J. Q. B., 114	...	...	...	...	78
Fordyce <i>v.</i> Bridges, 1 H. L. C., 4	...	...	...	...	27, 192
Forth <i>v.</i> Chapman, 1 P. W., 667n	...	...	...	...	112
Foveaux, <i>In re</i> , 2 Ch., 501	...	...	...	...	179
Fowle <i>v.</i> Welsh, 1 B. & C., 29	...	...	...	...	40, 95
Framji <i>v.</i> Hormasji, 3 B. H. C. R., O. C., 49	...	...	...	...	215
Furnival <i>v.</i> Coombes, 3 M. & G., 736 ; 6 Scott. N. R., 522	...	...	...	...
				41,	103

... G.

Gangabai <i>v.</i> Thavar Mulla, 1 B. H. C. R., 71	...	...	...	134
Ganga Ram <i>v.</i> Chandan Singh, 4 All., 62	...	...	...	89
Garner <i>v.</i> Garner, 29 Beav., 116	...	...	...	116
Garnett <i>v.</i> Bradley, 3 App. Cas., 952	...	...	...	20
Garth <i>v.</i> Meyrick, 1 Bro. C. C., 30	...	...	...	116
George <i>v.</i> George, 6 N. W. R., 221	...	...	...	15
Gillett <i>v.</i> Gane, L. R., 10 Eq., 29	...	...	...	116
Gogun Chunder Ghose <i>v.</i> Dharonidhar Mandal, 7 Cal., 616	...	...	89	
Gokool Nath Guha <i>v.</i> Issur Lochun Roy, 14 Cal., 222	...	133, 134		
Goodtitle d. Edwards <i>v.</i> Bailey, 2 Cowp., 597	...	78, 79		
Gordon <i>v.</i> Anderson, 4 Jur. N. S., 1097	...	...	153	
Gorton <i>v.</i> Champneys, 1 Bing., 301	...	...	212	
Gough <i>v.</i> Bult, 16 Sein., 45	...	...	...	171
Gowan <i>v.</i> Wright, 18 Q. B. D., 204 ; 56 L. G. Q. B., 132	...	17, 196		
Greaves <i>v.</i> Tofield, 14 Ch. D., 571 ; 50 L. J., Ch., 119	...	...	18	
Greedharee <i>v.</i> Nundokissore, 11 M. I. A., 405 ; 8 W. R., P. C., 25	...	...	172	

				<i>Page.</i>
Green <i>v.</i> Price, 13 M. & W., 695	...	...	...	39
Greender Chunder Ghose <i>v.</i> Troylucko Nath Ghose, 20 Cal.,				
373	...	...	...	95
Grey <i>v.</i> Pearson, 6 H. L. C., 106	...	...	...	23, 63
Grey's Trust, <i>In re</i> , 3 Ch., 88	...	...	...	107
Guddalu <i>v.</i> Kunnathur, 7 M. H. C. R., 189	...	...	...	49, 54
Gujrat Trading Co. <i>v.</i> Trikamji, 3 Bom. H. C. R., O. C., 45	...	...	...	215
Gulabhai <i>v.</i> Dayabhai, 10 B. H. C. R., 51	...	...	...	87
Gungaram <i>v.</i> Punam Chand, 21 Bom., 826	...	...	...	215
Gureebullah Sircar <i>v.</i> Mohun Lall Shaha, 7 Cal., 132 ;				
8 C. L. R., 414	...	...	...	25, 192
Gurusami Pillai <i>v.</i> Sivakami Ammal, 22 I. A., 128 ; 18 Mad..				
347	...	...	...	15, 25, 112

H.

Hajrat <i>v.</i> Valiubnessa, 18 Bom., 432	...	...	...	215
Hall <i>v.</i> Seabright, 1 Mod., 14	...	...	...	79
Hamilton, <i>In re</i> , 2 Ch., 370	...	...	...	173
Hamilton Trench <i>v.</i> Hamilton, 2 Ch., 370	...	...	...	173
Hanbury, <i>In re</i> , 1 Ch., 415	...	...	...	173
Hannant Ramchandra <i>v.</i> Babaji Abaji, 16 Bom., 172	...	...	...	64
Hanooman Persaud <i>v.</i> Mussamut Babooee, 6 M. I. A., 411	...	...	...	11
Hari <i>v.</i> Secretary of State, 27 Bom., 424	...	...	...	188
Hari Lall <i>v.</i> Bai Rewa, 21 Bom., 376	...	...	...	142
Hari Mohun Bysack <i>v.</i> Krishna Mohun Bysack, 9 B. L. R.,				
App., 1	...	...	...	54
Harris <i>v.</i> Rickett, 28 L. J. Ex., 197	...	...	...	49
Harrison, <i>In re</i> , 30 Ch. D., 390	...	...	...	108
Harrison <i>v.</i> Blackburn, 17 C. B. N. S., 678 ; 34 L. J. C. P.,				
109	...	...	...	63
Harrison <i>v.</i> Foreman, 5 Ves. Jun., 207	...	...	...	167
Harvey <i>v.</i> Harvey, 32 Beav., 445	...	...	...	16, 112
Heath <i>v.</i> Crealock, L. R., 10 C. A., 22	...	...	...	85
Heinangini Dasi <i>v.</i> Nobin Chand Ghose, 8 Cal., 788, 11				
C. L. R., 370	...	...	...	139
Hem Chunder Soor <i>v.</i> Kally Churn Dass, 9 Cal., 528	...	...	...	58
Henderson <i>v.</i> Sherborne, 3 M. & W., 236	...	...	...	220
Hesse <i>v.</i> Stevenson, 3 B. & P., 365	...	...	...	20, 36

	Page.
Heydon's case, 3 Rep., 8	... 207
Hibbert <i>v.</i> Purchas, L. R., 3 P. C., 650	... 217
Hill <i>v.</i> Hill, 1 Q. B., 483	... 173
Hind <i>v.</i> Marshall, 1 B. & B., 385	... 95
Hinde <i>v.</i> Bandry, 2 Mad., 13	... 29, 195
Hirabai <i>v.</i> Lakshmibai, 11 Bom., 573	... 141, 161
Hiscocks <i>v.</i> Hiscocks, 5 M. & W., 363	... 121
Hitchcock <i>v.</i> Way, 6 A. & E., 947	... 222
Holliday <i>v.</i> Overton, 14 Beav., 470	... 82
Homer <i>v.</i> Homer, 8 Ch. D., 758	... 118
Hooley <i>v.</i> Hatton, 2 Dick., 461 ; 1 Bro. C., 390 <i>n</i>	... 151
Hope <i>v.</i> Potte, 3 K. & J., 209	... 114
Hormasji <i>v.</i> Dadabhoy, 20 Bom., 310	... 11
Hotham <i>v.</i> East India Co., 1 T. R., 645	... 101
Hukum Chand <i>v.</i> Hira Lall, 3 Bom., 159	... 52
Humfrey <i>v.</i> Dale, 7. W. R. (Eng.), 467	... 54
Humphrey <i>v.</i> Tayleur, 1 Amb., 137	... 158
Humphrey <i>v.</i> Taylor, 1 Dick., 162	... 158
Hunter <i>v.</i> Nockolds, 1 Man. & Gord., 651	... 202
Hurst <i>v.</i> Beach, 5 Mad., 351	... 154
Hutchins <i>v.</i> Gathercole, 6 D. M. & G., 1	... 207
Hutchison <i>v.</i> Hammond, 3 Bro. C. C., 127	... 170
Hutchison and Tenant, <i>In re</i> , Sch. D., 540	... 173
Huxham <i>v.</i> Wheeler, 3 H. & C., 73	... 189

I.

Indayet <i>v.</i> Lal Chand, 18 All., 168	... 52
India (The), B. & L., 224 ; 33 L. J., Ad., 193	... 217
Indur Chunder <i>v.</i> Luchmi Bibi, 7 B. L. R., 682	... 55
Indur Kunwar <i>v.</i> Jaipal Kunwar, 15 Cal., 725 ; 15 I. A., 127	... 108
Ingleby <i>v.</i> Swift, 10 Bing., 84	... 82

J.

Jackson, <i>In re</i> , 25 Ch. D., 162	... 145
Jackson <i>v.</i> Jackson, 2 Cox., 35	... 153
Jadu Rai <i>v.</i> Bhabataran Nundy, 17 Cal., 173	... 48
Jairam <i>v.</i> Kuberbai, 9 Bom., 491	... 159, 175

				Page.
James v. Cochrane, 7 Ex., 177	...	...	...	93
Jamnabai v. Khimji, 14 Bom., 1	...	•	...	129
Jane Parker, <i>In the goods of</i> , 1 S. W. & T., 523			...	163
Javerbai v. Kalibai, 16 Bom., 492		..	...	143
Jay v. Johnston, 1 Q. B., 28	...	...	...	18
Jee v. Andley, 1 Cox, 324	...	...	...	176
Jeeson v. Wright, 2 Bligh, 56	...	...	...	113
Jennings v. President, Municipal Commission, 11 Mad., 253	...	...	...	18, 199
Jitu Lal Mahta v. Binda Bibi, 16 Cal., 549	...		...	161
Jodrell, <i>In re</i> , 44 C. b. D., 390 ; 59 L. J. Ch., 538			...	43, 44
Jogeswar v. Ram Chand, 23 I. A., 37 ; 23 Cal., 670			...	16
Jogeswar Narain Deo v. Ram Chandra Dutt, 23 Cal., 670 ; 23 I. A., 37	...	...	...	16, 113, 140, 159
Johnes v. Johnes, 3 Dow., 15	...		...	211
Johnson v. Johnson, 3 Ha., 157	...		...	163
Joliffe v. East., 3 Bro. C. C., 25	...		...	160
Jone v. Barkley, 2 Dough, 689	...		...	101
Jones v. Badley, L. R., 3 Ch., 362			...	174
Jones v. Williams, 2 Amb., 651	...		...	179
Jubb v. Hull Dock Co., 3 Q. B., 455			...	6
Jugtanand v. Nerghan, 6 Cal., 435			...	54

K.

Kailash Chunder Neogi v. Harrish Chunder Biswas, 5 C. W. N., 158	...	...	...	52
Kali Charan Ghosal v. Ram Chandra Mandal, 30 Cal., 783			...	174
Kallian v. Pathubai, 17 Bom., 289			...	215
Kally Prosunna Mitter v. Gopee Nath Kur, 7 C. L. R., 241	...	...	...	177, 178
Kameshar v. Bhikan, 20 Cal., 609			...	202
Kashee Nath Chatterjee v. Chundy Churn Bannerjee, 5 W. R., 68	...	...	...	58
Kashinath Chuckerbutty v. Brindabun Chuckerbutty, 10 Cal., 649	...	...	...	51
Kasim Mundle v. Sreemutty Noor Beebee, 1 W. R., 76	...		...	48
Kasi Nath Dass v. Hurihur Mookerjee, 9 Cal., 898			...	58
Kay v. Godwin, 6 Bing., 582	...	...	...	221

	<i>Page.</i>
Kemble <i>v.</i> Farren, 6 Bing., 141 ; 31 R. R., 366	... 99
Kessowji <i>v.</i> Khimji, 12 Bom., 507	... 18
Key <i>v.</i> Key, 4 De G. M. & G., 73	... 7, 109
Kherodemoney <i>v.</i> Doorgamoney, 4 Cal., 455	... 81
Khimji Jairam <i>v.</i> Morarji, 22 Bom., 533	... 144, 147
Kidd <i>v.</i> North, 14 Sim., 463 ; 2 Phill., 91	... 153
King <i>v.</i> Williams, 1 W. Bl., 93	... 195
Kingston <i>v.</i> Preston, 2 Doug., 689 ⁿ	... 101
Kristo Kishore <i>v.</i> Seetamonee, 7 W. R., 320	... 61
Knapp's Settlement, <i>In re</i> , 1 Ch., 91	... 147
Knight <i>v.</i> Knight, 2 Bead. 148	... 172
Knox <i>v.</i> Lord Hotham, 15 Sui., 82	... 171
Koonj Behari <i>v.</i> Shiva Baluk, Agra, F. B., 123	... 54
Koonjbekari Dhur <i>v.</i> Premchand Dutt, 5 Cal., 684	... 141
Krishnanath <i>v.</i> Atmaram, 15 Bom., 543	... 144, 147
Kristoromoni Dassee <i>v.</i> Maharaja Narendro Krishna Bahadur, 16 I. A., 38 ; 16 Cal., 383	... 25
Krishnaramoni Dasi <i>v.</i> Ananda Krishna Bose, 4 B. L. R., O. C., 231	... 124, 134, 175
Krishna Rao <i>v.</i> Benabai, 20 Bom., 571	... 144, 147
Kumara <i>v.</i> Srinivasa, 11 Mad., 213	... 52
Kumara Asima Krishna Deb <i>v.</i> Kumara Kumara Krishna Deb, 2 B. L. R., O. C., 11	... 124
Kumarasami <i>v.</i> Subbaraya, 9 Mad., 325	... 133
Kumar Tarakeswar Roy <i>v.</i> Kumar Shoshi Shikhareswar, 10 I. A., 51 ; 9 Cal., 952	... 126, 143, 168

L.

Lakshminishankar <i>v.</i> Vaijnath, 6 Bom., 24	... 134
Lala Ramjewan <i>v.</i> Dal Koer, 24 Cal., 406	... 16, 21
Lala Ramjewan Lal <i>v.</i> Dalkoer, 24 Cal., 407	... 142
Lalit Mohun Singh Roy <i>v.</i> Chukkun Lall Roy, 24 I. A., 26 ; 24 Cal., 834	... 21, 112, 138, 168
Lalla Himmut <i>v.</i> Llewellen, 11 Cal., 486	... 52
Lambe <i>v.</i> Eames, L. R., 6 Ch., 597	... 173
Langdon <i>v.</i> Goole, 3 Lev., 22	... 10
Lassence <i>v.</i> Tiernay, 1 Mac. & G., 551	... 172
Lavison <i>v.</i> Tremere, 1 A. & E., 792	... 85

			<i>Page.</i>
Law Union <i>v.</i> Hill, 3 A. C., 265	...	...	7
Lay <i>v.</i> Mottram, 10 C. B. N. S., 479	•	...	93
Ledger <i>v.</i> Hooker, 18 Jur., 481	...	...	153
Leigh <i>v.</i> Kent, 3 T. R., 364	•	...	217
Leighton <i>v.</i> Barllie, 3 M. & K., 267	...	...	154
Leman <i>v.</i> Damodaraya, 1 Mad., 158	...	...	213
Lewis <i>v.</i> Marshall, 7 Man. & Gr., 729	...	...	62
Lewis <i>v.</i> Rees, 3 K. & J., 147	...	...	40
Ligott <i>v.</i> Barrett, 15 Ch. D., 309	...	...	48
Llewellyn <i>v.</i> Earl of Jersey, 11 M. & W., 183		...	91
Logan <i>v.</i> Courtown, 13 Beav., 29 ; 20 L. J. Ch., 355		...	27
Lord Dungannon <i>v.</i> Smith, 12 Cl. & F., 546	...	...	177
Longbottom <i>v.</i> Satoor, 1 M. H. C. R., 429	...	...	129
Lord Elphinstone <i>v.</i> The Monkland Iron and Coal Co., 11 App. Cas., 332	...	...	99
Lord Huntingtower <i>v.</i> Gardiner, 1 B. & C. 299		...	213
Lord Walpole <i>v.</i> Earl of Cholmondeley, 7 T. R., 138		...	45
Lovett <i>v.</i> Lovett, 1 Ch., 82	...	...	85
Lowe <i>v.</i> Darling, 2 K. B., 784 ; 15 L. J. K. B., 1025		...	220
Lyndon <i>v.</i> Standbridge, 2 H. & N., 45	...	...	111

M.

Macduff, <i>In re</i> , 2 Ch., 451	...	...	...	133
MacFarlane <i>v.</i> Car., 8 B. L. R., 459	...	...	...	55
Mackenzie <i>v.</i> Childers, 43 Ch. D., 275	...	...	...	93
Mackenzie <i>v.</i> Mackenzie, 2 Russ., 262	...	...	...	152
Mackenzie <i>v.</i> Strirainiab, 13 Mad., 472	...	...	80, 103	
Maddy's Estate, <i>In re</i> , 2 Ch., 820	...	...	...	85
Madhub Chunder <i>v.</i> Rajcoomar, 14 B. L. R., 76		...	...	103
Maharani Indar Kunwar <i>v.</i> Maharani Jaipal Kunwar, 15 I. A., 127	...	...	...	12
Mahomed Shamsool <i>v.</i> Shewakram, 2 I. A., 7 ; 14 W. R., 229	...	...	16, 21, 111, 140	
Makoonda Lal Shaw <i>v.</i> Ganesh Chandra Shaw, 1 Cal., 104		...	...	125
Malim <i>v.</i> Keighly, 2 Ves., 333	...	...	...	172
Malchus <i>v.</i> Broughton, 13 Cal., 193		...	...	129
Mangaldas <i>v.</i> Tribhuvandas, 15 Bom., 652	...	...	144, 147	
Mana <i>v.</i> Rama, 20 Mad., 275	...	...	...	55

	<i>Page.</i>
Mangal Sen <i>v.</i> Shankar Sahai, 25 All., 580 ...	89
Manjamuna <i>v.</i> Padmanabhayya, 12 Mad., 393 ...	144, 147
Manjaya <i>v.</i> Sesa Shetti, 11 Mad., 477 ...	29, 195
Mann <i>v.</i> Thompson, Kay, 638 ...	149
Mannox <i>v.</i> Greener, L. R., 14 Eq., 456 ...	139
Marine Insurance Certificate, <i>In re</i> , 19 Bom., 130 ...	46
Maseyk <i>v.</i> Fergusson, 4 Cal., 304 (671) ...	147, 166
Matungini Dassi <i>v.</i> Monomotho Nath Bose, 4 C. W. N., 542	23
Mayen <i>v.</i> Malden, 16 Mad., 254 ...	53
Mayor of Lyons <i>v.</i> Advocate-General of Bengal, 3 I. A., 32 ; 1 Cal., 303 ...	128
Mellor <i>v.</i> Daintree, 33 Ch. D., 205...	6
Mersey Steel and Iron Co. <i>v.</i> Naylor, 9 Q. B. D., 648 ; 51 L. J. Q. B., 576 ...	16
Middleton <i>v.</i> Crofts, 2 Atk., 675 ...	220
Mitchell <i>v.</i> Brown, 1 Ell. & Ell., 274 ; 28 L. J. M. C., 55 ...	220
Mitchel <i>v.</i> Reynolds, 1 Sm. L. C., 476 ...	102
Moggridge <i>v.</i> Thackwell, 1 Ves., 473 ...	154
Mahendra Nath Mukerjee <i>v.</i> Jogendra Nath, 2 C. W. N., 260 ...	52
Mohesh Chunder Dass <i>v.</i> Madhub Chunder Sirdar, 13 W. R., 86 ...	26, 182
Mohunt Kishen Geer <i>v.</i> Basgeet Roy, 14 W. R., 579 ...	61
Mohur Shaik <i>v.</i> Queen-Empress, 21 Cal., 392 ...	8, 188
Mokoondo Lall Shaw <i>v.</i> Ganesh Chunder Shaw, 1 Cal., 101	171
Monohur Das <i>v.</i> Bhagabati Dasi, 1 B. L. R., O. C., 28 ...	51
Monohur Mookerjee <i>v.</i> Kasiswar Mookerjee, 3 C. W. N., 478 ...	168
Monypenny <i>v.</i> Dering, 2 De G. M. & W., 145 ...	126
Monypenny <i>v.</i> Monypenny, 9 H. L. C., 146 ...	4
Moon <i>v.</i> Durden, 2 Ex. R., 27 ...	214
Moore <i>v.</i> McGrath, 1 Cowp., 12 ...	14, 83
Moore <i>v.</i> Rawlins, 6 C. B. N. S., 320 ...	15
Morarji <i>v.</i> Nenbai, 17 Bom., 351 ...	129, 134
Morice <i>v.</i> Bishop of Dismal, 9 Ves. Jun., 399 ; 10 Ves. Jun., 521 ...	133
Morley <i>v.</i> Bird, 3 Ves., 629 ...	158
Morrell <i>v.</i> Fisher, 4 Ex., 591 ...	119, 120

	<i>Page.</i>
Morris v. Panchananda , 5 M. H. C. R., 135 ...	... 55
Morris v. Sambamurthi , 6 M. H. C. R., 126 ...	... 215
Moss v. Cooper , 1 J. & H., 352 ...	... 174
Mosseley v. Motteux , 10 M. & W., 533 ...	... 84
Mostyn v. Mostyn , 5 H. L. C., 155 ...	... 115
Mulchand v. Madho Ram , 10 All., 421 ...	... 49
Mussamut Kollainy Koer v. Luchmi Persad , 24 W. R., 395 ...	... 141, 158
Mussoorie Bank v. Raynor , 9 I. A., 70 ; 4 All., 500	.. 173

N.

Nana Tara v. Allarakha , 4 Bom., 573n ...	... 158
Nanak Ram v. Mehin Lal , 1 All., 496 ...	27, 192
Nandi Singh v. Sita Ram , 16 I. A., 47 ; 15 Cal., 677 ...	... 158
Nash v. Palmer , 5 M. & S., 374 ...	... 95
Natha v. Dhunbhaiji , 23 Bom., 1 ...	... 173
Navroji v. Perozbai , 23 Bom., 80 ...	... 159
Newholt v. Price , 14 Sein., 354 ...	... 116
Nidhoomoni v. Saroda , 3 I. A., 253 ; 26 W. R., 91 ...	... 117
Nind v. Marshall , 1 Bro. & Bin., 338 ...	... 20
Nobokanth Dey v. Raja Barodakanth , 1 W. R., 100 ...	... 215
Narendra Nath Sircar v. Kaimalvasini Dasi , 23 I. A., 18 ; 23 Cal., 563 ...	... 168, 208
North British Ry. Co. v. Tod , 12 Cl. & Fin., 731 ...	... 90
Nunn's Trust, In re , L. R., 19 Eq., 331 ...	... 116
Nur Ali v. Abdul Ali , 19 Cal., 773 ...	... 103

O.

Oakes v. Jackson , 1 Mad., 134 ...	... 103
O'Flaherty v. McDowell , 6 H. L. C., 157 ...	... 216
Ogden v. Blackledge , 2 Cranch, 276 ...	... 181
Oldfield, In re , 1 Ch., 549 ...	... 173
Overseer of West Ham v. Iles , 8 App. Cas., 388 ...	... 204
Owen v. Thomas , 3 My. & K., 353 ...	... 36

P.

Packhurst v. Smith , Willes, 327 ...	... 79
Pallar v. Neptune Ins. Co. , 5 C. P. D., 40 ...	... 19

	<i>Page.</i>
Palmer <i>v.</i> Mallett, 36 Ch. D., 421 ; 57 L. J. Ch., 228 ...	97
Pandorf <i>v.</i> Hamilton, 17 Q. B. D., 670 ; 5 L. J. Q. B., 546	104
Parashram <i>v.</i> Kakhna, 15 Bom., 305 ...	213
Parker <i>v.</i> Merchant, 1 Y. & C. Ch., 290 ; 11 L. J. C. h., 223	63, 110
Passmore <i>v.</i> Oswaldthistle, A. C., 314 ...	218
Parsons <i>v.</i> Parsons, 1 Ves. Jun., 266 ...	115
Pickering <i>v.</i> Ilfracombe Ry. Co., L. R., 3 C. P., 250 ; 37 L. J. C. P., 118	80
Pickersgill <i>v.</i> Rodger, 5 Ch. D., 163 ...	163
Pitcairne <i>v.</i> Brase, Finch, 403 ...	115
Pitt Rivers, <i>In re</i> , 10 Ch. 403 ...	174
Pogose <i>v.</i> Bank of Bengal, 3 Cal., 174 ...	52
Ponnayya <i>v.</i> Muttu, 17 Mad., 146 ...	47
Ponnusamy <i>v.</i> Collector of Madura, 3 M. H. C. R., 37 ...	213
Pordage <i>v.</i> Cole, 1 Wms. Saund., 3186 ...	93
Portal and Lamb, <i>In re</i> , 27 Ch., 602 (on appeal) 30 Ch., 35 ...	135
Prabhakarbhāt <i>v.</i> Vishwambhar, 8 Bom., 321 ...	207
Preonath Shaha <i>v.</i> Madhu Sudan, 25 Cal., 606 ...	51
Prankristo Chunder <i>v.</i> Bama Soondary Dassee, 9 W. R., 1, P. C.	168
Price <i>v.</i> Page, 4 Ves. Jun., 680 ...	121
Pride <i>v.</i> Fooks, 3 DeG. & J., 266 ...	114
Prosanno Coomar Ghose <i>v.</i> Tarucknath Sircar, 10 B. L. R., 267	141
Pugh <i>v.</i> Golden Valley Ry. Co., 15 Ch. D., 330 ...	45
Punardeo <i>v.</i> Ram Sarup, 25 Cal., 858 ; 2 C. W. N., 577 ...	202
Punchoomonee <i>v.</i> Troylucko, 10 Cal., 342 ...	16
Pym <i>v.</i> Campbell, 6 E. & B., 370 ...	49, 53

Q.

Queen <i>v.</i> Alloo Paroo, 3 M. I. A., 488 ...	17, 197
Queen <i>v.</i> Bishop of Oxford, 4 Q. B. D., 245 ...	8, 188
Queen <i>v.</i> Commissioner of Incometax, 22 Q. B., 306 ...	22
Queen <i>v.</i> Indarjit, 11 All., 266 ...	204
Queen <i>v.</i> Overseer of Tonbridge, 13 Q. B. D., 342 ; 53 L. J., Q. B., 491 ...	17, 196

				<i>Page.</i>
Queen-Empress <i>v.</i> Babaji, 17 Bom., 127	...			29, 195
Queen-Empress <i>v.</i> Balkrishna, 17 Bom., 578	...	23, 29, 189, 195		
Queen-Empress <i>v.</i> Gobinda, 20 All., 159	...	...	23	
Queen-Empress <i>v.</i> Himai, 20 All., 158	...	...	23	
Queen-Empress <i>v.</i> Hori, 21 All., 396	...	...	23	

R.

Rabutty Dassee (sreemutty) <i>v.</i> Shibchunder Mullick, 6 M. I. A., 17	...	...	34, 65	
Radhajeebun <i>v.</i> Bisseswar, 2 Hay, 179	...	...	24	
Rai Bishen Chand <i>v.</i> Asmaida Koer, 11 I. A., 164 ; 6 All., 560	...	...	144, 175	
Raikishori Dassi <i>v.</i> Debendronath Sircar, 15 I. A., 37 ; 15 Cal., 409	...	...	143, 144, 168	
Raja Padmanand <i>v.</i> Hayes, 5 C. W. N., 812 ; 28 Cal., 733 ; 28 I. A., 157	...	...	...	22
Rajnarain <i>v.</i> Katyayani Bewa, 21 Bom., 376	...	...	16	
Rakken <i>v.</i> Alagappudyan, 16 Mad., 83	...		51	
Rambhat <i>v.</i> Shankar, 26 Bom., 528	...	...	187	
Ram Doyal Bajpie <i>v.</i> Hura Lall Paray, 3 C. L. R., 386	...		58	
Ramjeebun Serowgy <i>v.</i> Oghore Nath Chatterjee, 25 Cal., 401 ; 2 C. W. N., 188	...	...	...	48
Ram Lall Mookerjee <i>v.</i> Secretary of State, 8 I. A., 46 ; 7 Cal., 304 ; 10 C. L. R., 349	...	...	22, 168	
Ram Lall Sett <i>v.</i> Kanai Lall Sett, 12 Cal., 663		144, 147, 175		
Ram Raoji <i>v.</i> Pralhaddas, 20 Bom., 133	...		187	
Rameshur <i>v.</i> Sheodin, 12 All., 517	...	...	214	
Rainsden <i>v.</i> Hilton, 2 Ves. Sen., 310	...	...	83	
Redfern, <i>In re</i> , 6 Ch. D., 133	...	...	...	6
R. <i>v.</i> Adamson, 2 Moody, 286	...	...	...	50
R. <i>v.</i> Baines, 12 A. & E., 226	...	...	...	206
R. <i>v.</i> Bhista, 1 Bom., 311	...	...	...	213
R. <i>v.</i> Bond, 1 B. and Ald., 392	...	...	...	213
R. <i>v.</i> Burah, 8 App. Cas., 899	...	...	...	188
R. <i>v.</i> Cambridgeshire, 7 A. & E., 491	...	...	...	206
R. <i>v.</i> Cheadle, 3 B. & A., 833	...	...	...	49
R. <i>v.</i> Jackson, Cowp., 298	...	...	...	220
R. <i>v.</i> Stepney Corporation, 1 K. B., 325 ; 21 I. J. K. B., 244		219		

	Page.
R. v. Wright, 1 Burr., 543	219
Reilly v. Jones, 1 Bing., 302	99
Rewun Persad v. Mussamat Radha Beeby, 4 M. I. A., 137	161, 164
Richards v. Jones, 1 Ch., 438	173
Richardson v. Watson, 4 B. & Ad., 787	122
Richie v. Atkinson, 10 East., 295	101
Right v. Bucknell, 2 B. & A., 281	86
River Wear Commissioners v. Adamson, 2 App. Cas., 763	1, 198, 207
Robinson v. Barton Eccles, L. R., 8 App. Cas., 801	205
Rochester v. Bridges, 1 B. and Ad., 859	214, 217, 218
Rock v. Callen, 6 Ha., 531	154
Rooke v. Lord Kensington, 2 K. & J., 769 ; 25 L. J. Ch., 795	83
Runchordass v. Parvatibai, 26 I. A., 71 ; 3 C. W. N., 621 ; 23 Bom., 725	133, 134
Ruckinaboye v. Lulloobhoy, 5 M. I. A., 234	23, 190
Russell v. Dickson, 4 Clarke's H. L. C., 293	153
Russel v. Ledsman, 14 M. & W., 589	181

S.

Sabapati v. Narainsvami, 1 M. H. C. R., 115	216
Sah Lal Chand v. Indrajit, 22 All., 370 ; 4 C. W. N., 485 ; 27 I. A., 93	52
Salkeld v. Johnson, 2 Ex., 282	202, 203
Sally Mahomed v. Lady Janbai, 3 Bom. L. R., 785	147
Saloman v. Saloman, App. Cas., 38	26
Sarasundari Debi v. Gobindmani, 2 B. L. R., A. C., 137	155
Saunders v. Evans, 8 H. L. C., 729	87
Savill v. Bethell, 2 Ch., 537	96
Scott, <i>In re</i> , 1 K. B., 228	163
Seal v. Taylor, 1 Ch., 316	120
Seth Mulchand v. Bai Mancha, 7 Bom., 491	141
Sett v. Sett, 12 Cal., 685	81
Shaw v. McMahon, 4 Dr. & W., 431	149
Shaw v. Ruddin, 9 Ir. C. L. R., 219	203
Sheeb Chunder Maneeah v. Brojonath Aditya, 14 W. R., 301	32, 67

	<i>Page.</i>
Sheoratan v. Mahipal , 7 All., 270 ...	... 14
Sherrat v. Benty , 2 My. & K., 165	... 131
Shivram v. Kondiba , 8 Bom., 345	... 215
Shore v. Wilson , 9 Cl. & F., 566 ...	3, 33, 57
Shuttleworth v. Le Fleming , 19 C. B. N. S., 687	... 195
Simmons v. Rudall , 1 Sim. N. S., 136	... 88
Sirdar Gurdyal Singh v. Raja of Faridkote , 21 I. A., 185	184, 186
Sitapathi v. Queen , 6 Mad., 36 ...	... 216
Siva Rau v. Vitla Bhatta , 21 Mad., 425	... 140
Skerrate v. Oakley , 7 T. R., 492 ...	... 109
Skinner's Trust, Re , 1 J. & H., 102	... 171
Smith (J. G.) v. Ludha , 17 Bom., 143	... 55, 62
Smith d. Dorner v. Packhurst , 2 Atk., 135	... 37, 79
Smith v. Ridgeway , I. R., 1 Ex., 331	... 120
Solly v. Forbes , 2 B. & B., 38 ...	... 78
Sookinoy Chunder Dass v. Srimati Monohurri Dasi , 12 I. A., 110 ; 11 Cal., 692	... 8, 124, 139
Soorjeemony Dassee v. Denobundhu Mullick , 6 M. I. A., 552 ...	16, 21, 103, 131, 140, 144, 168
Sorabji v. Govind , 16 Bom., 93 ...	... 23
Sorabji v. Justice of Peace , 12 Bom. H. C. R., 255	... 213
Sorsbie v. Park , 12 M. & W., 158 ; 13 L. J. Ex., 11	97, 98
Soudamini Dasi v. Jogesh Ch. Dutt , 2 Cal., 262	81, 147
Soulle v. Gerrard , 2 Cro. El., 525	... 12
South Eastern Ry. Co. v. Warton , 6 H. & N., 528	... 86
Sowdamonee Dehya v. A. Spalding , 12 C. L. R., 163	... 53
Sowell v. Garrett , 2 Cro. El., 422	... 12
Spalding v. Spalding , Cro. Car., 185	... 114
Sprackling v. Ranier , 1 Dick., 344	... 149
Sreemutty Kristoroinoney Dassee v. Maharaja Narendro Krishna , 16 I. A.; 29 ; 16 Cal., 383	... 168
Sreemutty Puddo Monee Dasi v. Dwarka Nath Biswas , 25 W. R., 335	... 80
Sreemutty Rabutty Dassee v. Shibchunder Mullick , 6 M. I. A., 17	... 34, 65
Srimati Brahmainayi Dasi v. Joges Chandra Dutt , 8 B. L. R., 400	... 125
Srinavasa v. Dandayudapani , 12 Mad., 411	... 144

	<i>Page.</i>
Standen <i>v.</i> Chrismas, 10 Q. B., 141	... 94
Standen <i>v.</i> Standen, 2 Ves., 589 ...	... 116
Stanley <i>v.</i> Stanley, 2 J & H., 491	... 120
Stannard <i>v.</i> Forbes, 6 A. & E., 587	... 94
Stavers <i>v.</i> Curling, 3 Bing. N. C., 368	... 101
Stead <i>v.</i> Mellor, 5 Ch. D., 225 ...	... 173
Stephenson, <i>In re</i> , 1 Ch., 75 ...	... 146
Stevens <i>v.</i> Jeacocke, 17 L. J. Q. B., 165	... 214
Stewart <i>v.</i> Sheffield, 13 East., 526 ...	... 149
Stockdale <i>v.</i> Bushby, 19 Ves., 381	... 115
Stokes <i>v.</i> Chuk, 28 Beav., 610 ...	... 171
Stone <i>v.</i> Corporation of Yeovil, 1 C. P. D., 691 ; 45 L. J. C. P., 657 ...	... 37
Stradling <i>v.</i> Morgan, 1 Plowd., 204	... 207
Stricklands <i>v.</i> Williams, 1 Q. B., 384	... 99
Stronghill <i>v.</i> Buck, 11 A. & E., 787	... 86
Sturges <i>v.</i> Pearson, 4 Mad., 411 ...	... 168
Styles, <i>v.</i> Wardle, 4 B. & C., 908 ...	... 50
Subbarayer <i>v.</i> Subbamal, 27 I. A., 163 ; 24 Mad., 214	... 117
Suisse <i>v.</i> Lowther, 2 Ha., 432 ...	... 154
Surbomungola Debi <i>v.</i> Mohendro Nath, 4 Cal., 508	... 133
Surtees <i>v.</i> Ellison, 9 B. & C., 752 ...	... 107, 221
Sutton <i>v.</i> Sutton, L. R., 22 Ch. D., 511	... 202

T.

Tagore <i>v.</i> Tagore, I. A., Sup. Vol., 79 ; 9 B. L. R., P. C., 109 ; 18 W. R., C. R., 371 ...	8, 45, 110, 126, 138, 161, 168, 171
Tarachurn Chatterjee <i>v.</i> Suresh Chunder Mookerjee, 16 I. A., 166 ; 17 Cal., 122 ...	16, 112, 168
Taylor <i>v.</i> Bullen, 5 Ex., 779 ...	... 90
Taylor <i>v.</i> Corporation of Oldham, L. R., 4 Ch. D., 410	19, 200
Taylor <i>v.</i> Corporation of St. Helens, 2 Ch. D., 270 ...	95
Thakur Harihar <i>v.</i> Thakur Umar, 14 I. A., 7 ; 14 Cal., 296	22, 61
Thames Conservators <i>v.</i> Hall, L. R., 5 C. P., 419 ...	216
Thellusson <i>v.</i> Woodford, 4 Ves. Jun., 325 ...	124
Tisdale <i>v.</i> Essen, Hob., 34 ...	... 79
Towns <i>v.</i> Wentworth, 11 Moo., P. C., 526 ...	6

		<i>Page.</i>
Tribhuvandas <i>v.</i> Gangadass, 18 Bom., 7	...	144
Tribhovandas <i>v.</i> Krishnaram, 18 Bom., 283	...	32
Trinidad Asphalte Co. <i>v.</i> Conyat, A. C., 587	...	85
Tiruvengada <i>v.</i> Rangasami, 7 Mad., 19	...	54
Tuckey <i>v.</i> Henderson, 33 Beav., 174	...	153
Turner, <i>In the goods of</i> , L. R., 2 P. & D., 403	...	106
Turtle <i>v.</i> Hartwell, 6 T. R., 429	...	211

U.

Uma Churn Bag <i>v.</i> Ajadunnessa Begum, 12 Cal., 430	...	205
Umesh Chunder <i>v.</i> Mohini Mohun, 9 C. L. R., 301	...	53
Umesh Chunder Mookerjee <i>v.</i> E. Sageman, 5 B. L. R., 633n	...	60
Underwood <i>v.</i> Wing, 4 DeG. M. & G., 633 ; 19 Beav., 459	157	

V.

Vagliano <i>v.</i> Bank of Bengal, A. C., 120	...	208
Vaithelinga <i>v.</i> Samnada, 2 Mad., 44	...	103
Valampuducherri <i>v.</i> Chowakaren, 5 M. H. C. R., 320	...	60
Vasudeva <i>v.</i> Narasamima, 5 Mad., 6	...	52
Venkata Lutchmi <i>v.</i> Srirungaratnam, 11 M. L. J., 91	...	187
Venkataratnam <i>v.</i> Reddiah, 13 Mad., 494	...	58
Virjwandas <i>v.</i> Mahomed Ali, 6 Bom., 208	...	67
Vydinada <i>v.</i> Nagammal, 11 Mad., 258	...	113, 159

W.

Wallgrave <i>v.</i> Tebbs, 2 K. & J., 313	...	174
Wallis <i>v.</i> Smith, 21 Ch. D., 249	...	99
Walsh <i>v.</i> Trevanion, 15 Q. B., 751 ; 19 L. J. G., 462 ; 14 Jur., 1196	...	81
Warde <i>v.</i> Warde, 16 Beav., 105	...	95
Webb <i>v.</i> Byng, 1 K. & J., 580	...	35, 57
Webb <i>v.</i> Kelley, 9 Sein., 469	...	171
Webb <i>v.</i> Plummer, 2 B. & Ald., 751	...	95
Webber <i>v.</i> Corbitt, 16 Eq., 515	...	122
Webber <i>v.</i> Stanley, 16 C. B. N. S., 698	...	120
Weeks <i>v.</i> Maillandst, 14 East., 568	...	90
West <i>v.</i> Lawday, 11 H. L. A., 375	...	118

	<i>Page.</i>
Western Counties Ry. Co. v. Windsor Ry. Co., 7 A. C., 188 ; 51 L. J. P. C., 48	... 216
Weston Dairies v. Tagart, 2 Ch., 164	... 93
Whitbread v. Lord St. John, 10 Ves. Jun., 152	... 149
White v. Boot, 2 T. R., 275	... 216
White v. Pullock, 7 App. Cas., 400	... 107
Whyte v. Whyte, 17 Eq., 50	... 154
Williams, <i>In re</i> , 2 Ch., 12	... 173
Williams v. Ashton, 1 J. & H., 118	... 88
Willion v. Berkley, Plowd., 223	... 96
Wilson v. O'Leary, 12 Eq., 525 ; 7 Ch., 448	... 154
Wing v. Angrave, 8 H. L. C., 183	... 157
Winter v. Winter, 5 Ha., 306	... 162
Wisden v. Wisden, 2 Sein. & G., 396	... 163
Wolverhampton New water works v. Hawkesford, 6 C. B., N. S., 356	... 218
Wood v. Bowcliffe, 6 Ex., 407	... 90
Woolfun v. Jesarat, 27 Cal., 263	... 29
Woomesh Chunder Mookerjee v. Sageiman, 12 W. R., O. C., 2	31
Wray v. Field, 2 Russ., 257 ; 6 Mad. & Gen.	300, 152

X.

Xenos v. Wickham, L. R., 2 H. L., 296	... 46
---------------------------------------	--------

Y.

Yarmouth (Corporation of) v. Simmons, 10 Ch. D., 528	... 19
Yeweres v. Noakes, 6 Q. B. D., 535; 50 L. J., Q. B., 135	... 18
Young v. Davies, 2 Dr. & S., 167	... 149
Young v. Raincock, 7 C. B., 310	... 86
Young v. Smith, 1 Eq., 183 ; 20 Beav., 90 ; 35 Beav., 90	... 82

THE INTERPRETATION
OF
DEEDS, WILLS AND STATUTES
IN BRITISH INDIA.

LECTURE I.
INTRODUCTORY.

General Rules relating to the interpretation of written instruments.

THE subject-matter of these Lectures is the interpretation of three classes of written instruments ; for a deed, a will or a statute is each of them a written instrument (1). It necessarily embraces a very wide area ; and the reported decisions dealing with the interpretation of each of these three classes of written instruments are very numerous. The leading principles, however, which govern the interpretation of deeds, wills and statutes, have been very clearly laid down by the older English authorities, and the Courts of this country have been guided by those principles when they have been called upon to interpret these instruments. It is not proposed therefore in these Lectures to go exhaustively into the whole of the case-law on the subject, but to attempt to deduce the broad general principles on which it has proceeded. For upon the

(1) *Per Lord Blackburn, River Wear App. Cas., 763.*
Commissioners v. Adamson (1877), 2

whole we may take it as a general rule that the decisions of Courts of Justice are the evidence of what is common law, in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide to the future (1). And it must be remembered that it is the *reason* and *spirit* of cases that make the law ; not the letter of particular precedents (2).

A deed may be defined as a formal writing of a non-testamentary character capable of delivery which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title or interest.

A will is the legal declaration of the intentions of a testator with respect to his property which he desires to be carried into effect after his death (3).

A Statute or Act is the edict of the Legislature.

In dealing with written instruments the importance of fixed and determinate rules of interpretation is manifest, and not less manifest is the importance of a knowledge of those rules. In construing deeds and testamentary instruments, the language of which, owing to the use of inaccurate terms and expressions, frequently falls short of, or altogether misrepresents, the views and intentions of the parties, such rules are necessary in order to insure just and uniform decisions ; and they are equally so where it becomes the duty of a Court of Law to unravel and explain those intricacies and ambiguities which occur in legislative enactments, and which result from ideas not sufficiently precise, from views too little comprehensive, or from the unavoidable and acknowledged imperfections of language. In each case, where doubt or difficulty arises, peculiar principles

(1) 1 Bl. Com.

(3) Indian Succession Act (X of 1865).

(2) *Per Lord Mansfield, Fisher v. Sec. 3.
Prince* (1762), 3 Bur., 1364.

and methods of interpretation are applied, reference being always had to the general scope and intention of the instrument, the nature of the transaction, and the legal rights and situation of the parties interested.

Although each of these three classes of instruments are in many respects different from the other two, yet they all have certain common characteristics, and certain fundamental rules apply to all alike. For instance, in the interpretation of each of these three classes of instruments, the object, and the only object, is to ascertain the intention of the maker or makers of the instrument. But the word "intention" has two meanings. It may be understood as descriptive either (a) of that which the parties intended to do, or (b) of the meaning of the words they have employed; and it must be remembered that in the interpretation of deeds, wills and statutes, it is invariably used in the latter sense. In other words, the question always is "What is the meaning of what the maker or makers of the instrument have said?" not "What did the maker or makers mean to say?" The latter question is one which the law does not permit to be asked; it being a presumption *juris et de jure*, to rebut which no evidence is allowed, that the parties intended to say that which they have said (1). The first general rule, therefore, relating alike to deeds, wills and statutes, may be stated as follows:—

Rule A.—The object of the interpretation of deeds, wills and statutes must be to ascertain the expressed meaning or intention of the maker or makers of the instrument, the expressed meaning being equivalent to the intention(2).

It is upon intention either *expressly declared* or *collected by just reasoning* upon the terms of the

(1) *Norton on Deeds* (1908), p. 42. (1842), 9 Cl. and F., 255 at p. 525.

(2) *Per Coleridge, J., Shore v. Wilson*

instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, that the Court feels bound to proceed (1). The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed : a most important distinction in all classes of construction and the disregard of which often leads to erroneous conclusions (2). The use of the expression, that the intention of the testator is to be the guide, unaccompanied by the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the real question, which is, *what that which he has written means* (3). It is not the duty of a Court of Justice to search for the testator's meaning, otherwise than by fairly interpreting the words he has used (4). The construction of an Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature ; we cannot aid the Legislature's defective phrasing of the Act ; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend what it has not expressed clearly ; much more, if the Legislature intended something very different ; if the Legislature intended something pretty nearly opposite of what it said, it is not for the Judges to invent something which they do not meet.

(1) *Per Turner, L. J., Dos de Broadbent v. Thomson* (1858), 12 M. P. C. C., 127.

(2) *Per Lord Wensleydale, Mong-*

penny v. Monypenny (1861), 9 H. L. C., 146.

(3) *Per Lord Wensleydale, Abbott v. Middleton* (1858), 7 H. L. C., 114.

(4) *Per Lord Cranworth, ib., p. 96.*

with in the words of the text (aiding their construction of the text always, of course, by the context) ; it is not for them to supply a meaning, for, in reality, it would be supplying it . . . (1). The business of the interpreter is not to improve the statute ; it is to expound it. The question for him is not what the Legislature meant, but what its language means. To give it a construction contrary to, or different from, that which the words import or can possibly import, is not to interpret the law, but to make it ; and Judges are to remember that their office is *jus dicere non jus dare* (2). It must, therefore, be borne in mind that in the course of these lectures whenever the word "intention" is used, it is used in the sense of "expressed intention" as defined above.

But in the interpretation of written instruments the Courts always strive to uphold, if possible, the entire instrument and to place such meaning upon it as may carry out and effectuate to the fullest extent the intention of the parties. The second general rule, therefore, may be stated as follows :—

Rule B.—A liberal construction should be put upon deeds, wills and statutes, so as to uphold them, if possible, and carry into effect the intention of the parties.

This Rule really embodies two maxims of most general application in construing written instruments, namely, *first*, that they shall be so interpreted, if possible, that they operate as valid instruments rather than be treated as a nullity, and *secondly*, that such meaning shall be given to them so as to carry out and

(1) *Per Lord Brougham, Crawford v. Spooner* (1846), 6 Moon. P. C. C., 9.

(2) Maxwell, 4th Ed. (1905), Stat. and see cases cited there.

effectuate to the fullest extent the intention of the makers (1).

For this purpose :—

(a) When any word material to the full expression of the meaning has been omitted, it may be supplied by the context (2).

It has been decided that in furtherance of the obvious intent of the parties even a blank may be supplied in a deed (3).

The Court is not to be deterred by an accidental omission from putting the true signification on the will (4). If the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared (5).

Where the alternative lies between either supplying by implication words which appear to have been accidentally omitted or adopting a construction which deprives certain existing words of all meaning, it is usual to supply the words (6).

(b) The meaning of any clause is to be collected from the entire instrument, and all its parts are to be construed with reference to each other (7).

(1) *Benignæ faciundæ sunt interpretationes ut res magis valeat quam pereat; et verba intentione, non contraria, debent inservire.* Co. Litt. 36a.

(1877), 6 Ch. D., 133, at p. 138.

(5) *Towns v. Wentworth* (1858), II Moo. P. C., 526, at p. 543; *Mellor v. Daintree* (1886), 33 Ch. D., 205, 6, 574.

(2) Succession Act, sec. 64.

(6) *Jubb v. Hull Dock Co.* (1846),

(3) *Coles v. Hume* (1828), 8 B. & C., 9 Q. B., 455; *Hardcastle*, 3rd Ed., 1901, 123.

(4) *Per Bacon, V. G., In re Redfern*

(7) Succession Act, sec. 69.

For this purpose a codicil is to be considered as part of the will (1). There are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed (2). It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done (3). The rule is to adhere to the language and meaning of the instrument, remembering throughout that in adhering to the language you must take the full instrument as written. So far as any particular passage or any one statement is concerned, if you can infer anything reasonable from that statement itself, then you ought to do so, and if you can, you may compare that reasonable inference with what seems to be manifestly apparent in other parts of the instrument (4).

The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances

(1) Succession Act, sec. 69.

(3) *Barton v. Fitzgerald* (1812), 15

(2) *Per Knight Bruce, L. J., Key v.*

East, 541.

Key (1853), 4 D. M. & G., 73, at pp. 84, 85.

(4) *Per Halsbury, L. C., Law Union v. Hill* (1902), 3 A. C., 265.

to be conferred (1). Thus an invalid gift over may be indicative of the intention of the testator not to confer an absolute estate (2).

One part of a statute must be so construed by another that the whole may if possible stand (3). The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, *viz.* :—that, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat*. (4). This rule has, however, been held not to apply to Acts like the Hindu Wills Act. In *Cally Nath v. Chunder Nauth* (5), Pontifex, J., in dealing with the decision of Wilson, J., in *Anangamonjori Debi v. Sonamoni Debi* (6) said :—“ I also of course agree with the learned Judge that it is a settled canon of construction that a Statute ought to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant. But can the Hindu Wills Act standing alone be called a Statute within the meaning of that canon? It is not even a skeleton of a Statute, but a mere heap of inarticulate dry bones, which require to be set up and clothed with the flesh of the Succession Act, before the Act itself can give forth any sound. Its preamble gives no intimation that it was expedient to give enlarged powers over their estates to Hindu testators. On the contrary, it was a restricting rather than an enabling

(1) *Tagore v. Tagore* (1872), I. A., Sup. Vol. 79; 9 B. L. R. P. C., 409; 18 W. R. C. R., 371. See *Sookmoy Chunder Dass v. Srimati Monohurri Dasi* (1885), 12 I. A., at p. 110; 11 Cal., 692.

(2) *Anandra v. Administrator General of Bombay* (1895), 20 Bom., 450.

(3) Bac. Abr., 7th Ed. (1832), tit. Statute I, sub-sec. 2; *The Queen v.*

Bishop of Oxford, 1879, 4 Q. B. D., 245, 261; *Mohur Shaikh v. Queen-Empress* (1893), 21 Cal., 392, 399.

(4) *Per Bowen, L. J.—Curtis v. Storin* (1889), 22 Q. B. D., 507.

(5) (1892), 8 Cal., 378, at pp. 389, 390.

(6) (1881), 8 Cal., 157.

Act. It does not apply to Hindus in the Madras and Bombay Presidencies, outside the Presidency towns, or to the inhabitants of the North-Western Provinces or the Punjab. It is scarcely likely therefore that the Legislature could have intended to make any radical alteration in Hindu Law. It is not even called 'an Act to amend and define the law of Hindu Testamentary Succession,' but simply 'an Act to regulate the wills of Hindus.'

"It seems to me, therefore, that in setting up and clothing each dry bone of the inarticulate bundle contained in section 2 of the Hindu Wills Act, we must add, either at the beginning or the end of each section introduced from the Succession Act, the proviso or qualification contained in section 3 of the Hindu Wills Act."

This view was upheld by the Court of Appeal in *Anangamonjori Debi's* case (1). White, J., in dealing with this point stated :—"Hence, in construing an Act of the Government of India passed in the form peculiar to the Hindu Wills Act, I think the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters, so far as the latter do not contravene the full and natural meaning of the provisos ; and this is the sound rule of construction, although the result of carrying it out may be, and in the present case is, that some of the applied sections are rendered nugatory."

The effect of the decision in *Anangamonjori Debi's* case is to render part of the exception to section 99 of the Succession Act and sections 100 and 101 of that Act

inapplicable to the wills of Hindus governed by the Hindu Wills Act.

(c) Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred (1).

The condition in a bond was:—“If therefore Philip Goole shall pay to John Garnes the elder's executors within one year after his death the bond shall be void.” Held that either the words “John Garnes the elder's executors” should be disjoined and be read “John Garnes the elder his executor” and to be taken “John Garnes the elder and his executors” or that the words should be wholly rejected as void and the words be read “to be paid to John Garnes” only (2). If a particular construction of a part of a document renders a contract evidenced by it inoperative, and another construction renders it operative and is reconcileable with other portions of the document, the first should give way to the second (3). Where a trust-deed contained a proviso that if any of the sons of the settler became insolvent, his share and interest in the net income of the trust-estate should cease, and such share should be paid for the maintenance and support of his wife and son and the plaintiff, who was one of the sons of the settler, filed his petition in the Insolvent Court on July 10th, 1894, but withdrew it under the order of the Court on December 5th, 1894, it was held that the proviso for the cesser of the interest of any son becoming insolvent was not void as being repugnant to the previous gift of the share of the net income, thereby giving effect to the whole of the deed.

(1) Succession Act, sec. 71.

(2) *Langdon v. Gool*, 3 Lev., 22.

(3) *Dheraj v. Hurdeo* (1871), 18 W. R.,

122.

On the other hand, it being shown that no distribution was made during the pendency of the plaintiff's insolvency proceedings, that no money was actually due or had become payable during the insolvency ; that no claim or attempt to intercept it was ever made on behalf of the official assignee or by the donees under the limitation over, and that the plaintiff was a free man and perfectly able to receive the money at the time when the next distribution, according to the deed, could take place, and it being clear from the intention of the settler as apparent from the deed, was to benefit his own sons directly and as long and as far as was practicable, it was further held, in order to carry out the intention of the settler as far as the law would permit, that the insolvency proceedings were not such as were contemplated by the deed, and that therefore the plaintiff's interest had not ceased by reason of the proviso (1). Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses (2).

That is to say, no part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it (3). When, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though

(1) *Hormasji v. Dadhabhoy* (1895), 20 the word proprietor was construed as Bom., 310. manager.

(2) *Hunooman Persaud v. Mussamut* (1888), 6 M. I. A., 411. Where Babaoss

(3) Succession Act, sec. 72.

the construction adopted is not the most grammatically correct (1). Where a gift of all the testator's property is followed by gifts of specific portions of it or *vice versa* both gifts may take effect (2). This is brought about by changing the order of the bequests. It is quite clear that, where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being transposed, the Courts are warranted in making that transposition (3). To alter the language of a testator is evidently a strong measure, and one which, in general, is to be justified by a clear explanatory context. It often happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough : it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one ; and, if this be clear, the alteration of language is warranted by the established principles of construction (4). One of the earliest authorities for this construction is *Soule v. Gerrard* (5) ; where a testator having four sons, devised lands to Richard, one of his sons, and his heirs for ever, and if Richard died within the age of one-and-twenty years, *or* without issue, then, that the lands should remain to his other three sons. Richard died under age, leaving issue a daughter. It was held, that in the

(1) *Per Lord Cranworth, Abbot v. Middleton* (1858), 7 H. L. C., 68. at p. 89 ; *Maharani Indar Kunwar v. Maharani Jaipal Kunwar* (1888), 15 I. A., 127, at p. 147, 15 Cal., 725, 749.

(2) *Theobald*, 6th Ed. 722. *Cuthbert v. Lempriere* (1814), 3 Man. & S., 158 ; *Roe v. Snape v. Nevill* (1848), 11 Q. B., 466 ; *Blamire v. Geldart* (1809), 10 Ves., 31.

In re Arrowsmith's Trusts (1860), 8 W. R., 555 ; 2 D. F. & J., 474 ; Succession Act, sec. 69, *see (a)* and *(b)*.

(3) *Jarman*, 5th Ed., p. 465. See cases cited there.

(4) *Ib.*, p. 469.

(5) (1663) 2 Cro. El. 525 ; *sub nom. Sowell v. Garrett*. *Sir F. Moore*, 422.

event which had happened, the devise over to the three sons had failed ; for, that by the words and intent, it was not to commence unless *both* parts were performed, and that it was all one as if the disjunctive *or* had been a copulative. The ground for changing the testator's expression in these cases is, that as, by making the event of the devisee leaving issue a condition of his retaining the estate, he evidently intends that a benefit shall accrue to such issue through their parent, it is highly improbable he should mean this benefit to depend upon the contingency of the devisee attaining majority ; while, on the other hand, it is very probable that the testator should intend, in the event of the devisee dying under age leaving issue, to give him an estate which would devolve upon the issue ; but that, if he attained twenty-one, (the age at which he would acquire a disposing competency) he should take the estate absolutely ; i.e., whether he afterwards died leaving issue or not. The change of *or* into *and*, therefore, substitutes a reasonable for a most unreasonable scheme of disposition (1).

The rules for the construction of Statutes are very like those which apply to the construction of other documents especially as regards one crucial rule, *viz.*, that, if it is possible, the words of a Statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat* (2).

(d) Words and phrases may be controlled by the context.

Primarily, when general words are employed, they are to be taken in their general sense, but very frequently the context shows that such general sense is intended

(1) Jarman, pp. 471, 472.

(1880), 22 Q. B., 517.

(2) *Per Bowen, L. J., Curtis v. Stovin*

to be restricted (1). It is very common to put in a sweeping clause; and the use and object of it, in general, is to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature and description with those that have already been mentioned (2).

In construing the words of an instrument, then, it is proper to consider, *first*, what is their meaning in the largest sense which, according to the common use of language, belongs to them; and, if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, then, *secondly*, what is the object for which they are used? They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule, which requires that effect should be given to such intention of the parties as they have used fit words to express. Thus, in a settlement, the preamble usually recites what it is which the grantor intends to do, and this, like the preamble to an Act, is the key to what comes afterwards. It is very common, moreover, to put in a sweeping clause, the use and object of which is to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature and description with those which have been already mentioned, and such general words are not allowed to extend further than was clearly intended by the parties. Where a statute begins with words

(1) See *per Mahmood, J.*, *Sheoratan v. Mahipal*, (1884) 7 All., 270. (2) *Moore v. McGrath* (1774), 1 Cowp., 12.

which describe things or persons of an inferior degree and concludes with general words, the general words should not be extended to anything or person of a higher degree; that is to say, where a particular class of persons or things is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words are treated as referring to matters *ejusdem generis* with such class, the effect of general words when they follow particular words being thus restricted. So also, as will be shown later on, where a general enactment is followed by a special enactment on the same subject, the later enactment overrides and controls the earlier one. (1) The maxim embodied in this rule is—*Verba generalia restringuntur ad habilitatem rei vel personam*. General words may be aptly restrained according to the subject-matter or person to which they relate.

But ordinarily, words in general are to be taken in their ordinary sense, unless a clear intention to use them in another be collected (2). That is, when the language of a will is clear and consistent, it shall receive its literal construction unless there is something in the will itself to suggest departure from it (3). Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out.

(1) Broom's Legal Maxims, 6th Ed., pp. 602, 603, 605, 606, *per Willes, J.*, *Moore v. Rawlins* (1859), 6 C. B. N. S., 320.

(2) *George v. George* (1874), 6 N. W. R., 221. (3) *Gurusami v. Shvakami* (1895), 22 I. A., 129; 15 Mad., 358.

If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption (1). The word "Malik" or proprietor has been held only to pass a limited estate (2), and the word "dakhilar" or possessor has been construed in a limited sense (3). On the other hand, a devise to a widow for her maintenance, followed by an express power of alienation, has been construed as conferring an absolute estate (4).

If the same words occur in different parts of the will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary (5). Such intention must be very strongly indicated (6), but the same words applied to different subject-matter may bear a different meaning (7).

It is the duty of the Court to find out what the meaning of the Legislature is; and to attach a rational and beneficial meaning, if possible, rather than an irrational and an injurious meaning, to the statutes which have been passed by the Legislature (8). When two constructions are open, the Court may adopt the more reasonable of the two (9). Legislature must not be

(1) *Soorjeemonee Dossee v. Denobundhoo Mullick* (1857), 6 M. I. A., 550.

(2) *Muhomed v. Sherukram* (1874), 2 I. A., 7; *Punchoomonee v. Troylucky* (1884), 10 Cal., 342; but see *per contra* *Lala Ramjewan v. Dal Koer* (1897), 24 Cal., 406; *Rajnarain v. Kalyayani* (1900), 24 Cal., 649; *Hari Lal v. Bai Reba* (1895), 21 Bom., 376.

(3) *Tarachurn v. Suresh Chander* (1889), 16 I. A., 166.

(4) *Jogeshwar v. Ram Chandra* (1896), 23

I. A., 37; 23 Cal., 670.

(5) Succession Act, sec. 73.

(6) *Harvey v. Harvey* (1863), 32 Beav., 445.

(7) *Ballin v. Ballin* (1881), 7 Cal., 224; 9 C. L. R., 28.

(8) *Per Jessel, M. R., Mersey Steel and Iron Co. v. Naylor* (1882), 9 Q. B. D., 648, 660; 51 L. J. Q. B., 576, 584.

(9) *Per Lord Blackburn, Countess of Rothsay v. Kircaldy Water Works Co.* (1882), 7 App. Cas., 702.

supposed to intend a palpable injustice(1); and if an enactment is such that by reading it in its ordinary sense you produce a palpable injustice, whereas by reading it in a sense which it can bear although not exactly in its ordinary sense, it will produce no injustice, then one must always assume that the Legislature intended it to be read so as to produce no injustice(2). Thus, on the general principle of avoiding injustice and absurdity any construction would be rejected, if escape from it were possible, which enables a person to defeat a Statute or impair the obligation of his contract by his own act or otherwise profit by his wrong (3). If the words are "It shall and may" be so and so done, by such and such officer and body, then the word "may" is held in all soundness of construction to confer a power, but the word "shall" is held to make that power, or the exercise of that power, compulsory. Cases are not wanting where even without the use of so stringent a word as "shall", it has been held that a power so conveyed must be executed. But where it is intended not to compel, but to leave it optional with the parties, the words "think fit" are the very ordinary technical and appointed words, to show that the power is not compulsory(4). There is no doubt that in some cases the word "must" or the word "shall" may be substituted for the word "may," but that can only be done for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word "may" must be taken to be used in its

(1) *Ex parte Corbett* (1880), 14 C. D., R., *Gowan v. Wright* (1886), 19 Q. B. D., 204.

(2) *Per Brett, M. R., Queen v. Overseers of Tonbridge* (1884), 13 Q. B. D., 342; 53 L. J. Q. B., 491. (4) *Queen v. Alloo Paroo* (1847), 3 M. I. A., 492, 493. See *Anand Chunder Pal v. Panchilal Surma* (1870), 14 W. R., F. B., 36, s.c., 5 B. L. R., 691.

(3) *Maxwell*, 3rd Ed., 287, 4th Ed., 311 cited with approval by *Esher, M.*

natural, therefore in a permissive, and not in an obligatory sense(1). Where the context discloses a manifest inaccuracy in such case, the sound rule of construction is to eliminate the inaccuracy and to execute the true intention of the Legislature(2).

While it is true that we have no right to construe an Act itself by the practice which has taken place under that Act, it is equally true that we are entitled to construe that Act, not only upon the actual words used, but with reference to the practice which had grown up and was existing at the time when the Act was passed(3). If an Act uses the same language which was used in a former Act referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the Legislature, when using well-known words upon which there have been well-known decisions, used those words in the sense which the decisions have attached to them(4).

As a corollary to rule (d) it must be remembered that general provisions in the same Statute or other Statute are not to control or repeal the special provisions. The special provisions are to be read as excepted out of the general provisions. It may be laid down as a rule for the construction of Statutes that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provisions must be governed thereby and not by the terms of the general provision(5). The

(1) *Delhi and London Bank v. Or-
chard* (1877), 3 Cal., 57; 4 I. A., 135.

(2) *Jennings v. President, Municipal
Commission* (1887), 11 Mad., 253, 256.

(3) *Per Thesiger, L. J., Yeweres v.
Noakes* (1880), 6 Q. B. D., 535; 50
L. J. Q. B., 135.

(4) *Per James, L. J., Greaves v.
Tofield* (1880), 14 Ch. Div., 571; 50 L.

J. Ch., 119. See *Jay v. Johnston*
(1893), 1. Q. B., 28.

(5) *Per Quain, J., Drydon v. Overseers
of Putney* (1876), 1 Ex. D., 232.

reason why special provisions are to be read as excepted out of general provisions dealing with the same subject is because this is 'the only means of reconciling these two kinds of enactments(1). Again, where there are provisions in a special Act which are inconsistent with provisions of a prior general Act, the provisions of the general Act must yield to those of the special Act(2). But although, in order to reconcile general and special provisions dealing with the same subject special provisions are ordinarily to be read as excepted out of the general provisions, it must always be remembered that a general Statute may repeal a particular Statute(3). If a special enactment, whether it be in a public or private Act, and a subsequent general Act are absolutely repugnant and inconsistent with one another, the Courts have no alternative but to declare the prior special enactment repealed by the subsequent general Act(4). When an Act repeals a preceding Act which relates to a certain definite subject-matter distinctly laid down for the guidance of those who are to be operated on by the Act in that special matter, or to a particular class of persons who are to be either protected, or it may be affected adversely by a particular clause of the enactment, then the Legislature is presumed to have had that very special subject-matter and that very special class of persons in contemplation when the subsequent Statute was passed ; and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will

(1) *Taylor v. Oldham* (1876), 4 Ch. D., 410. *Simmons* (1878), 10 Ch. D., 528.

(2) *Att.-Genl. v. Great Eastern Railway Co.* (1873), L. R., 6 H. L., 367 ; cited in *Yarmouth (Corporation of) v.* *Neptune Ins. Co.* (1880), 5 C. P. D., 40.

(3) *Per Bramwell, L. J., Paltar v. Neptune Ins. Co.* (1880), 5 C. P. D., 40.

(4) *Hardcastle*, 3rd Ed., 344.

be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the Court, in construing the subsequent general Act, would expect to find something or other, pointing out that the attention of the Legislature had been turned towards the former special enactment, and, in passing the general Act, that it had made the new enactment with the view of embracing every case (including that special case) embraced within the provisions of the previous Act(1).

It must, however, be remembered that the inference that general words are intended to be used in a restricted sense from the context must be one which is plain and irresistible before the Court will limit the operation of the general words(2); and the Court is not entitled to exercise vague conjectures about the hardship of cases and to consider ingeniously what the parties must have meant when the words are clear and precise and admit of no ambiguity at all(3).

(e) The grammatical and ordinary sense of the word is to be adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid the absurdity, repugnance or inconsistency, but no further.

(1) *Garnett v. Bradley* (1878), 3 App. & P. 574, 575.
 Cas., 952, 953.

(3) *Bind v. Marshall* (1819), 1 Bro. & Bin., 338.

(2) *Hesse v. Stevenson* (1803), 3 Bos.

This rule is generally called Lord Wensleydale's Golden Rule, and has been universally accepted as a correct enunciation of the law. In laying down that the ordinary and grammatical sense of the words must be adhered to in the first instance, what is meant is this: Most words have a primary meaning, that is, a meaning in which they are generally used, and a secondary meaning, that is, a particular meaning in which they are used in a particular context. Take the word *malik*, for instance. Its primary and ordinary meaning is "an absolute owner," or to use the phraseology of the English Courts, "an owner in fee-simple." But when it is applied to describe the estate to be taken by a Hindu widow or daughter, it is frequently used in a secondary and more restricted meaning and passes only a limited estate and not an estate in fee-simple(1). Then, again, certain words have acquired either by usage or by statutory enactment a technical meaning, and where such words appear in a deed, will, or Statute, they are in the first instance to be presumed to have been used in that technical sense(2). This is very clearly laid by Turner, L. J., in delivering the judgment of the Privy Council in *Soorjeemoney Dossee v. Dinobundo Mullick*(3); and the principle he there enunciates applies equally to deeds, wills, and Statutes. "Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its

(1) *Mahomed Shamool v. Sherwak*. 2 I. A., 7; 14 B. L. R., 226; 22 W. R., 409. But see *Lala Ram* *jewan v. Dal Koer* (1897), 24 Calc., 406.

(2) *Lalit Mohun v. Chukkun Lal* (1897), 24 Cal., 834; 24 I. A., 76.; 1 C. W. N., 387.

(3) (1858), 6 M. I. A., 550, 551.

dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption." Thus the words *naslan bad-naslan* in a deed(1) and *puttro poutradi* in a will(2) have acquired a technical meaning and pass an absolute estate.

The first duty of the Court in interpreting a deed, will or Statute is to look at the instrument as a whole, and in the first instance to give to every word the meaning that it ordinarily bears(3). If by this means it can ascertain the intention of the maker or makers of the instrument, nothing further is required, but if after giving the words the meaning they ordinarily bear, the Court is unable to ascertain the intention of the maker or makers of the instrument ; it is entitled to take the words of the instrument or such portion of them as may be necessary in their secondary meaning. But it must be borne in mind that in applying a secondary meaning to a word, such meaning must be one that the word is capable of bearing. The Court cannot arbitrarily fix a meaning upon a word, in which it never has been used and which it is incapable of bearing, in order to reconcile it to the general intention apparent from the instrument. Moreover, for a word to acquire a technical meaning, unless it has done so by statutory enactment, it must be ordinarily used by the general public in that meaning and not by a limited portion (4).

(1) *Thakur Harihar v. Thakur Umar* 5 C. W. N., 812; 28 Cal., 733; 28 I. A., (1886), 14 I. A. 7; 14 Cal., 296. 157; *Harris v. Brown* (1901), 5 C. W.

(2) *Ram Lali Mookerjee v. Secretary of State* (1881), 8 I. A., 46; 7 Cal., 301. N., 729; 28 Cal., 621; 28 I. A., 159.

(3) *Raja Padmanund v. Hayes* (1901), (4) *Queen v. Commissioners of Income-Tax* (1888), 22 Q. B., 306.

The mere literal construction of a Statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the Statute, and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated(1). Thus, in construing sec. 7 of the Statute of Limitations, 21 James I, c. 16, it was held that the words "beyond the seas" were in legal import and effect synonymous with the words "out of the territories and out of the realm"(2). The words "all claims enforceable under the attachment" in sec. 276 of the Civil Procedure Code have been held to include the claims of execution-creditors subsequent to an assignment by the judgment-debtor of the property attached (3). The words "The decree-holder" in sec. 311 of that Code have been held to mean the decree-holder who brings the property to sale, not any decree-holder (4).

Rule C.—Where the language of a deed, will or Statute is plain and unambiguous, and admits of one meaning only, that meaning, and that meaning alone, is to be given to it(5).

Where the language of an instrument is plain in itself and admits of one meaning only, even though that

(1) *Per Lord Selborne, Caledonian Ry. Co. v. North British Ry. Co.* (1881), 6 App. Cas., 114, at p. 122, *per Lord Blackburn*, p. 131; *Grey v. Pearson* (1857), 6 H. I. C., 106; *Christopher v. Lotinga* (1864), 33 L. J. C. P., 123; *Eastern Counties, &c. v. Marriage* (1860), 9 H. L. C., 36; *Bama Soonderee Dossee v. Verner* (1874), 13 B. L. R., 193; *Queen-Empress v. Balkrishna* (1893), 17 Bom., 578; *Queen-Empress v. Hori* (1899), 21 All., 396, overruling *Queen-Empress v. Hinali* (1897), 20 All., 158; and *Queen-Empress v. Gobinda*, ib., 159.

(2) *Ruckmaboye v. Lulloobhoy* (1852), 5 M. I. A., 234, 260.

(3) *Sorabji v. Govind* (1891), 16 Bom., 93, 100; dissented from *Matungini Dasi v. Monmotho Nath Bose* (1900), 4 C. W. N., 542; but the question there was not the same as in the Bombay case.

(4) *Matungini Dasi v. Monmotho Nath Bose*, dissenting from *Ajudhia v. Nand Lal* (1893), 15 All., 318.

(5) *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba flenda est.* In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument. *Broom Log. Max.* 6th Ed. (1881), 753.

meaning is contrary to the probable intention of the maker or makers of the instrument, the Court is not entitled to take this latter fact into its consideration. In Bottomley's case(1) Jessel, M. R., says: "Now I have always said, and I am repeating, I am afraid, what I have been compelled to repeat over and over again, that the argument of inconvenience is a very strong argument where the construction of a document is ambiguous, where it is fairly open to two constructions. Then the argument of inconvenience like that of absurdity may be used with great force; but when the construction is clear beyond controversy, it is of no answer to say that there are some consequences which will cause inconvenience and were probably not contemplated by the framers of the document." This rule is, to a certain extent, incorporated in the Evidence Act, though it is there stated somewhat differently. Section 94 of that Act lays down that "where language used in a document is plain in itself, and where it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts." This section, it is true, does not directly apply to wills,(2) but Wigram, V. C., in his Treatise on Wills, thus states the principle in his second Proposition: "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some

(1) (1880) 16 Ch. D., 686; *Radhajeetbun*

(2) Ev. Act, sec. 100.

v. *Bissoor* (1863), 2 Hay, 179.

popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." So where the language of the will is clear and consistent, it shall receive its literal construction unless there is something in the will itself to suggest departure from it(1). This rule embodies the old maxim *Absoluta Sententia expositore non eget*(2), or in other words, language that is unequivocal and unambiguous does not require an interpreter. Where the plain and obvious meaning of the language of the will of a Hindu testator showed an attempt to create an estate tail, the Court refused to put an interpretation on the will which would have necessitated reading the word "and" as "or"(3). Strictly speaking, there is no place for interpretation or construction except when the words of a Statute admit of two meanings(4). If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reason for enacting it(5). In short, when the words admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature, and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act but to alter it. But

(1) *Gurusami Pillai v. Sivakami Ammal* (1895), 22 I. A., 128; 18 Mad., 347. (4) Bell Dict., Law of Scotland, tit. Statute Hardcastle, 3rd Ed., p. 75.

(2) 2 Inst., 533. (5) *Buzloor Ruheem v. Shumsoonissa* (1867), 11 M. I. A., 551 at p. 604. See *Narendro Krishna Bahadur* (1888), 16 I. A., 38-43; 10 Cal., 383. *Gureebullah Strcar v. Mohun Lall Shaha* (1881), 7 Cal., 132; 8 C. L. R., 414.

the business of the interpreter is not to improve the Statute ; it is, to expound it. The question for him is not what the Legislature meant, but what its language means ; what it has said it meant. To give a construction contrary to, or different from that which the words import or can possibly import, is not to interpret law but to make it ;(1) "Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication(2). "We cannot allow any question of hardship to influence us in applying the principles of construction to Acts of the Legislature where the wording of those Acts is plain and unambiguous. We are not responsible for those Acts, and to put upon those Acts a construction different from that which, according to the principles of construction upon which a Court of Justice must act, they bear, would be to depart from our duty as Judges and to arrogate to ourselves the powers and functions of the Legislature. We have to construe "the Acts of the Legislature as we find them,—not to alter or amend them"(3). A practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful ; nor can a practice of a Court justify a Court

(1) Maxwell, 4th Ed., p. 7 ; *Crawford v. Spooner* (1846), 4 M. I. A., 187 ; *Moresh Chunder Dass v. Madhub Chunder Sirdar* (1870), 13 W. R., 86.

(2) *Per Lord Watson, Saloman v. Saloman* (1897), App. Cas., 38. (3) *Per Edge, C. J., Balkaran Rai v. Gobind Nath* (1890), 12 All., 137.

in putting upon an Act of the Legislature a construction which is contrary to the wording of the Act(1). Lastly, the intention of the Legislature must be ascertained from the words of a Statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute (2); and the Court knows nothing of the intention of an Act, except from the words in which it is expressed applied to the facts existing at the time(3).

But though the principle enunciated in Rule C applies equally to deeds, wills and Statutes; in the case of Statutes there is an exception which does not apply to deeds and wills. That exception is as follows :—

A case within the letter is not within the meaning of the Statute if it is not within the intention of the Legislature, and a case not within the letter is within the meaning of the Statute if it is within the intention^{**} of the Legislature.

Thus where a Statute provides that all who shall commit a certain act shall be deemed felons, yet a mad man who does the act shall not be deemed a felon; for that would be contrary to the presumable intention(4). And so, on the other hand, where an Act of Parliament gave the owners of inheritances a remedy by action against such tenants holding for life or *years* as should commit waste; the action was held maintainable against a tenant holding for one year or less, for so the law-makers presumably designed(5). In all instances where the strict letter of the law is thus corrected by reference to its intention, the construction is said to be by equity(6),

(1) *Balkaran Rai v. Gobind Nath* Beav., 29; 20 I. J. Chanc., 355; *Nanak (1890)*, 12 All., at p. 435. *Ram v. Mehin Lal* (1877), 1 All., 496.

(2) *Fordyce v. Bridges* (1847), 1 H.L.C., 4. (4) *Eyston v. Studd* (1574), Plowd., 465. (5) *ib.*, 467.

(3) *Logan v. Courtown* (1851), 13 (6) *ib.*

a phrase not peculiar to the law of England, but used by foreign jurists in the same sense; thus in the first example, the case would be said to be out of the equity of the act; in the second to be within its equity. It is to be observed, however, that this principle of equitable construction is not to be carried beyond certain bounds and a Judge is not at liberty, in favour of a supposed intention, to disregard the express letter of the Statute, where, for anything that appears, the wording may correspond with the actual design of the Legislature—the maxim in cases of this description being that *a verbis legis non recedendum est*. It is also important to remark, that the rule (*i.e.*, the exception) in question has been applied more freely to the ancient Statutes than it is now to those of more modern date, which are interpreted somewhat more strictly, and with closer adherence to the letter(1). The following definition of Equity of the Statute is given by Lord Coke(2). “Equity is a construction made by the Judges, that cases out of the letter of the Statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the Statute provideth; and the reason hereof is, for that the law-makers could not possibly set down all the cases in express terms.” Although the expression “equity of the Statute” is not now favoured by the courts, we find that a somewhat similar principle of construction is sometimes acted upon, and that if it is manifest that the principles of justice require something to be done which is not expressly provided for in an Act a Court of Justice will take into consideration the spirit and meaning of the Act apart from the words; in other words, there is still such a thing as construing an Act

according to its intent, though not according to its words(1). This construction by equity is applicable only to Statutes and not to deeds and wills, in as much as Statutes deal with the community at large and consequently have a far more extended and greater effect than deeds or wills which are acts of private parties. A very striking instance of the equity of the Statute is the principle laid down that a man is not liable to an action for damages or to a criminal prosecution for statements made by him in the witness box, even though such statements come within the letter of the definition of defamation laid down by the Penal Code(2).

Rule D. A latent ambiguity may, but a patent ambiguity cannot, be explained by extrinsic evidence.

By patent ambiguity must be understood an ambiguity *inherent in the words, and incapable of being dispelled*, either by any rules of legal construction applied to the instrument itself, or by evidence showing that terms, in themselves unmeaning or unintelligible, are capable of receiving a known conventional meaning. The great principle on which the rule is founded is that the *intention* of the parties should be construed not by vague evidence of their *intentions, independently of the expressions* which they have thought fit to use, but by the *expressions themselves*. Now those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in themselves *unintelligible* or because being intelligible they exhibit a plain and obvious *uncertainty*.

(1) *Hardcastle*, 114, 115; *Re Bethune Hospital* (1875), 19 Eq. 459. 11 Mad., 477; *Queen-Empress v. Babaji* (1892), 17 Bom., 127; *Queen-Empress*

(2) *Hinde v. Baudrey* (1876), 2 Mad., 13; *Manjaya v. Seshu Shetti* (1888), v. *Balkrishna* (1893), 17 Bom., 573; *Woolfun v. Jesarat* (1899), 27 Cal., 263.

In the first instance, the case admits of two varieties ; the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them : the term used may, on the other hand, be capable of no distinct and definite interpretation. Now, it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous, are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given not to any loose conjecture as to the intent and meaning of the party, but to the *expressed* meaning, and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or, being in themselves intelligible, exhibit a plain and obvious uncertainty and are equally capable of different applications to give an effect to them by extrinsic evidence as to the *intention* of the party, would be to make the supposed intention operate independently of any definite expression of such intention. By patent ambiguity, therefore, must be understood an *inherent ambiguity which cannot be removed* either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible are yet capable of conveying a certain and definite meaning(1).

The rule that extrinsic evidence may not be given to explain a patent ambiguity is to be found in section 93 of the Indian Evidence Act, which enacts that

(1) Starkie on Evidence, 4th Ed., p. 653.

where the language used in a document, is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects; and also in section 68 of the Indian Succession Act which provides that where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Instances of latent ambiguities are to be found in sections 95 to 98 of the Evidence Act and sections 63, 65 and 67 of the Succession Act. For instance, when the language is plain in itself but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense (1). So where a letter was addressed to a lady whose real name was Mrs. Sageman, but the letter was addressed to Mrs. White, evidence was admitted to show that Mrs. Sageman was known as Mrs. White and that the letter was given to her (2). When the facts are such that the language used might have been meant to apply to anyone, and could not have been meant to apply to more than one of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to (3). So where a debtor owes a creditor two or three sums of money and gives a written acknowledgment of a debt due, evidence may be given to show to what debt the acknowledgment related (4).

Where the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the

(1) Ev. Act, sec. 95.

Act, sec. 67.

(2) *Woomesh Chunder Mookerjee v. Sageman* (1869), 12 W. R., O. C., 2.

(4) *Woomesh Chunder Mookerjee v. Sageman* (1869), 12 W. R., O. C., 2.

(3) Ev. Act, sec. 96. See Succession

two it was meant to apply(1). This section embodies the old maxim *Falsa demonstratio non nocet*(2), that is, mere false description does not make an instrument inoperative; and this maxim is made applicable to wills by section 63 of the Succession Act which provides that where the words used in a will to designate or describe a legatee, or class of legatees, sufficiently to show what is meant, an error in the name or description shall not prevent the legacy taking effect and also by section 65 which provides that if the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous and the bequest shall take effect. Thus, where a parcel of immovable property is conveyed or mortgaged but in the deed incorrect particulars are given, such incorrect description will be rejected as erroneous on the authority of this maxim(3).

Extrinsic evidence may also be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense(4); for all these are instances of latent ambiguities. Where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under the surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for reason and common sense agree, that by no other means can the language of the

(1) Ev. Act, sec. 97.

bhovandas v. Krishnaram (1893), 18

(2) Broom Leg. Max., 584.

Bom., 283.

(3) *Sheeb Chunder Mahneekh v. Broj-
nath Aditya* (1870), 14 W. R., 301; Tri-

(4) Ev. Act, sec. 98.

instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language,—in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed,—in cases where terms of art or science occur,—in mercantile contracts, which in many instances, use a peculiar language employed by those only who are conversant in trade or commerce; and in other instances in which the words, besides their general meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect (1). The reason why extrinsic evidence is admissible to explain the ambiguities mentioned in this paragraph may be put very shortly. The interpreter avails himself of external aid to explain these ambiguities just as an ordinary individual would look into a dictionary to ascertain the meaning of a word.

Rule E.—The circumstances under which a deed, will or Statute was made may be taken into consideration in interpreting it (2).

The Evidence Act provides that any fact may be proved which shows in what manner the language of a

(1) *Per Tindal, C. J., Shore v. Wilson*, 9 Cl. and F., 566.

(2) *Contemporanea expositio est optimis et fortissima in lege*, 2 Inst., 11; *The*

best and surest mode of expounding an instrument is by referring to the time when and circumstances under which it was made., *Brooke*, 633.

document is related to existing facts(1) ; and the Succession Act lays down that for the purpose of determining questions as to what person or what property is denoted by any words used in a will a Court must enquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used(2).

In construing a written instrument the situation of the parties must be looked at, and the deed must be construed with reference to the situation of the parties and their rights at the time the deed was executed(3). Up to a certain stage, and apart from any question of ambiguity, extrinsic evidence is necessary to point the operation of the simplest instrument. Thus, were it the case of a deed conveying all the lands at A in the grantor's occupation ; until it was defined by proof what lands were in his occupation, the operation of the deed could not be known. So, were it a case of a will, and a bequest to the children of a party, or even the testator's own children ; to give effect to the bequest it would be necessary to define who the children were(4). External information in reality is requisite in construing every instrument ; but when any subject is thus discovered, which not only is within the words of the instrument, according to their natural construction but exhausts the whole of those words, then the investigation must stop ; you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by

(1) Ev. Act, s. 92, proviso 6.

Chunder Mullick (1854), 6 M. I. A., 17.

(2) Succession Act, s. 62.

(4) *Goodeve on Evidence*, p. 382.

(3) *Sreemutty Rabutty Dassee v. Sib-*

the author of the instrument, and are not permitted to go any further. Thus to that extent the Court is always at liberty to go in interpreting a will; in other words, the Court is to place itself in the position of the testator with the knowledge of all the facts with which he was acquainted, but it is not, in the course of interpretation, to introduce any evidence whatever of what were the intentions of the testator as contrasted with, or extending, or contracting, the language which he has used(1). The knowledge of the external circumstances of which their proof puts the Court in possession, places the Judge in the position of the maker of the instrument; and it is upon the survey, which that position affords him, he exercises the office of an expositor. Indeed, it is by the external circumstances as by a lamp, that the Court reads the instrument(2).

Upon this principle, also, depends the great authority which, in construing a Statute, is attributed to the construction put upon it by Judges who lived at the time when the Statute was made, or soon after, as being best able to determine the intention of the Legislature, not only by the ordinary rules of construction, but especially from knowing the circumstances to which it had relation; and where the words of an Act are obscure or doubtful, and where the sense of the Legislature cannot, with certainty, be collected by interpreting the language of the Statute according to reason and grammatical correctness, considerable stress is laid upon the light in which it was received and held by the contemporary members of the profession. "Great regard," says Sir E. Coke, "ought in construing a Statute to be paid to the construction which the sages of the law, who lived

(1) *Per Wood, V.O., Webb v. Byng* (2) *Goodeve Ev., p. 382.*

(1806), 1 K. & J., 580, 583.

about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers at the time when the law was made"(1). But it must always be remembered that the Courts are not entitled to take into their consideration the proceedings in the Legislative Council, and the decision in the *Administrator-General of Bengal v. Prem Lall Mullick* (2) has made a considerable change in the practice of the Indian Courts in addressing themselves to the circumstances under which an Act was passed in order to interpret it. This very important decision will be fully discussed in dealing with Statutes. Within this rule may be included the maxim *Certum est quod certum reddi potest*(3). That is sufficiently certain which can be made certain. For instance, an agreement in writing for the sale of a house did not by description ascertain the particular house, but it referred to the deeds as being in the possession of A. B. named in the agreement. The Court held the agreement sufficiently certain, inasmuch as it appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A. B. and consequently the house might be easily ascertained(4). An award that directs the costs of certain suits shall be paid by the plaintiff and defendant in specified proportions is sufficiently certain because it becomes so upon taxation of costs by the proper officer(5).

The last general rule applicable to deeds, wills and Statutes follows as a matter of course upon the preceding ones. It is:—

(1) Broom's Legal Maxims, p. 639.

(2) (1895), 22 I. A., 107; 22 Calc., 788.

(3) Now Max., 9th Ed., 265. Broom,
578.

(4) *Oinen v. Thomas* (1831), 3 My. and

K., 353.

(5) *Cargey v. Thomas* (1823), 2 B. and
C., 170.

Rule F.—A word or phrase in a deed, will, or Statute to which no sensible meaning can be given, must be eliminated.

The Court has no power to alter the words or to insert words which are not in the instrument, but it may, and ought to, construe the words in a manner most agreeable to the meaning of the maker, and may reject any words that are merely insensible(1). If possible, effect must be given to every word of an Act or other document; but if there is a word or a phrase therein to which no sensible meaning can be given, it must be eliminated(2). Thus, where in a deed or a will a clear express gift is given, it cannot be altered, cut down or taken away by vague and general words subsequently occurring in the instrument. Such vague and general words are inconsistent with the general meaning of the instrument and are insensible with reference to the words conveying the express gift and are therefore rejected as mere surplusage. So also where a section in a Statute contains a clear and express enactment, such enactment cannot be cut down or modified by vague general words occurring in a subsequent section. Where a word or a phrase occurs in an instrument to which no sensible meaning can be attached, it is treated as if it was not inserted in the instrument at all, and it does not affect the rest of the document. In dealing with such words and phrases, the Court proceeds on two well-known maxims: *Surplus agium non nocet*(3); Mere surplusage does not injure the instrument; and *Utile per inutile non vitiatur*(4); Surplusage does not vitiate that which in other respects is good and valid.

(1) *Per Willes, C. J., Smith v. Packhurst* (1741-2), Ark., 135, 136.

(2) *Stone v. Corporation of Yeovil* (1876), 1 C. P. D., 691, 701; 45 L. J. C. P.,

(3) *Branch Max.*, 5th Ed., 216. See

Broom Leg. Max., 6th Ed., 581.

(4) 3 Rep. 10.

The foregoing rules may be shortly summarised as follows : It is the duty of an interpreter of a deed, will or Statute to ascertain the meaning of the words used in the instrument and from such meaning to collect the intention of the maker or makers of the instrument. He is to put as favourable a construction as he can in order to uphold the instrument as a whole and to carry into effect as far as possible the intention of the maker or makers. To ascertain the meanings of the words used, he is first to look at the instrument as a whole and to compare each particular portion with the context in which it appears and with the document as a whole. In ascertaining the sense in which the words are used, he must remember the subject-matter of the instrument and apply such meaning to them as is most consistent with the matters to which they relate. Where the language admits of only one meaning, that meaning alone must be given to it ; and the interpreter must not allow his mind to be swayed by any feeling that such meaning is not in accord with the probable intention of the maker or makers of the instrument. Where the instrument is, on the face of it, defective, he is not entitled to seek external assistance in order to try and remedy the defect. Where the language is plain in itself but is insensible with reference to the surrounding circumstances or can have more than one application, the interpreter is entitled to have recourse to external assistance to explain the meaning of the language, and amongst other things is entitled to take into consideration the circumstances under which the instrument was made. If after having recourse to such external assistance as the law allows, he is unable to attach a sensible meaning to any particular word or phrase, he is entitled to reject it and to deal with the instrument as if such word or phrase did not exist therein.

But, although the principles enunciated in the general rules stated above apply alike to deeds, wills and Statutes, the manner in which they are applied to each of these three classes of written instruments varies owing to the different nature of each class from the others. A deed and a will contain the words of private parties, but a Statute does not. Bacon defines a Statute as "the will of Legislature enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in Parliament assembled" (1). Adapting that definition to Statutes in British India, a Statute may be defined as the will of Legislature enacted by the Governor-General in Council by and with the advice and consent of the members of the Supreme Legislative Council. A Statute, therefore, is far more reaching in its effect and deals with the rights and interests of the community at large. It is true that the construction of a Statute, like the operation of a will, depends upon the apparent intention of the maker to be collected from the particular provision and the general context, and Statutes as well as wills and deeds ought to be construed according to the intention of the parties that make them (2). But though it is a primary rule in the interpretation of a Statute that the intention of the Legislature is to be collected from the words (3), yet it occasionally happens, on account of the subject-matter of a particular Statute, that the Court in interpreting it is obliged in favour of the intention, to depart in some measure from the words, thereby following the maxim *Qui hæret in litera hæret in cortice*. (4)

(1) 8 Bac. Abr. Tit. "Statute."

(2) Dwarris, Chap. XII, p. 689.

(3) *Ib.*, 693.

(4) He who merely considers the letter of an instrument goes but skin deep into its meaning.

On the other hand, in the interpretation of a deed or a will, although the Court is entitled to place itself in the position of the maker with the knowledge of all the facts with which he was acquainted at the time he made the document, yet it cannot avail itself of any evidence of any intention on the part of the maker of the instrument that contradicts or extends or contraries the language used in the document.

Again, as between deeds and wills, the language used in a deed is construed far more strictly than in the interpretation of a will. A deed is a far more formal document than a will, and a person is presumed to have executed a deed after having given due consideration and taken proper advice as regards the subject-matter of the deed and the liabilities he is incurring under it, while one of the chief characteristics of a will is its informality. Section 61 of the Succession Act expressly lays down that it is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known therefrom. Consequently, in a deed the Court is guided by the strict legal meanings of the words, unless such meanings create a manifest contrariety or contradiction, but a greater latitude is allowed in the construction of a will because the testator is supposed to be *inops consilii* (1). In particular, as will be shown later on, while it is the duty of a Court to always pay due regard to the intention of the parties to the deed as collected from the whole instrument (2), yet ambiguous words in a covenant are taken most strongly against the covenantor (3); and if there is a personal covenant, followed

(1) *Par. Wood, V. C., Lewis v. Rees & P.*, 13, 22.
(1856), 3 K. & J., 147.

(3) *Fawle v. Welsh* (1822), 1 B. & C.

(2) *Browning v. Wright* (1799), 2 Bos. 29, 35.

by a proviso that the covenantor is not to be liable under the covenant, the proviso is held to be repugnant and void(1).

Moreover, a deed speaks from the date of its delivery, whereas a will speaks from the death of the testator. If a man on the same day executes and delivers a deed and executes a will, the deed is complete on that day and comes immediately into operation, although it may postpone the vesting of property until after the death of the maker, but the provisions of the will are nugatory and can have no effect until the death of the testator. A further difference between deeds and wills is that in a deed where there are two clauses which, after the application of all the rules of construction and the external assistance the Court is entitled to avail itself of, still remain wholly inconsistent with and irreconcileable to each other, the former prevails, whereas in a will where there are two such clauses the latter prevails.

It must also be remembered that the rules of equity with regard to gifts by deeds, by which fraud is presumed when they are obtained from persons standing in certain relations to the donees, are not applicable to gifts by wills. The influence which is undue in the case of a gift by a deed is very different from that which is required to set aside a will. In the case of gifts or other transactions by deed it is considered by the Courts of Equity that the natural influence, which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed in

such a position as would enable him to form an absolutely free and unfettered judgment. The law relating to wills is different from this. The natural influence of the parent or guardian over the child, the husband over the wife, or the attorney over the client may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent. There is nothing illegal in the parent or the husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that persuasion stops short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee is not overborne and subjected to the dominion of another.

In concluding this introductory Lecture it may not be amiss to refer to the remarks of Jessel, M. R., in *Aspden v. Seddon*(1) with respect to decisions on the interpretation of written instruments. He says: "No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document; that is to say, I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you.

It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result, especially in the case of wills, has been remarkable. There is, first, document A, and a Judge formed an opinion as to its construction. Then came document B, and some other Judge has said that it differs very little from document A—not sufficient to alter the construction—therefore he construes it in the same way. Then comes document C, and the Judge then compares it with document B, and says it differs very little and therefore he shall construe it in the same way, and so the construction goes on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has, by this process, come to be construed in the same manner."

Lord Halsbury, L. C., in *In re Jodrell*(1) on the same point, says: "For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not to part of it; and having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments—and to that extent it may be said that they are canons of construction. But the moment I depart from those general canons of construction applicable to all instruments—and I am overwhelmed with authorities about what particular

Judges have thought about other particular instruments, and whether in this or that particular instrument the Judge has been sufficiently satisfied that such and such was the meaning of the testator—I confess myself to be in a hopeless state of confusion. In the first place I do not know what mental thermometer there is to ascertain what degree of certainty is to be obtained. If there is sufficient to establish the meaning, why is it sufficient? And what does that mean? It must mean sufficient in the mind of the particular tribunal that has to decide. That there are particular phrases and sets of phrases to which the law would attach a particular meaning is true; and when unqualified and unexplained by anything else, those words are found in an instrument, of course you must give to those words or to those phrases the meaning which the law has attached to them, and it would be unreasonable if you did not; because you must suppose, in the absence of any other application, that the person who has used those phrases, or used the particular word, has used the phrase or the word in the sense which has hitherto been attached to it by the law, and there is no reason to go out of what you might call the ordinary and *prima facie* meaning of such expression." In the same case Lindley, L. J., says(1): "In truth, in this case, as in many others, the difficulty arises when you look away from the document which you have to construe—when you look into cases (that is to say) which have been decided on other documents more or less like the one before you. I do not propose to deal with decided cases at all. It may be that there were expressions in the documents then before the Court which made the Judges come to conclusions which

I cannot arrive at when I come to look at the will and codicils with which I have to deal. I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common forms. Whether in deeds, wills, or mercantile instruments, they may be valuable guides."

The way in which decisions upon the interpretation of a deed, will or Statute should be treated by a Court in referring to them for assistance in the interpretation of the instrument then before it is to extract the principle laid down or elucidated by those cases and to apply such principle to the document before it(1); and where a general principle for the construction of an instrument is once laid down, the Court will not be restrained from making its own application of that principle because there are cases in which it may have been applied in a different manner(2). But in this connection it must always be remembered that decisions in certain cases have established the law on a particular subject, as, for instance, the famous *Tagore* case(3); and the Courts are always careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of the Legislature itself, in matters affecting the rights of property, may fairly be treated as having passed into the category of established and recognised law(4).

(1) *Per Lord Kenyon, Lord Walpole v. Earl of Cholmondeley* (1797), 7 T. R., 138, 148.

(2) *Per Lord Eldon, Browning v. Wright* (1799), 2 B. & P., 13, 24.

(3) (1872), 9 B. L. R., 377, Sup. Vol. I. A., 47.

(4) *Pugh v. Golden Valley Railway Co.* (1880), 15 Ch. Div., 390, 334.

LECTURE II.

A DEED may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title or interest.

There is no need to make use of any particular form in the delivery of a deed. In practice it often happens that a man delivers the deed in the presence of his own solicitor only, and possibly retains it in his own possession. The question whether this is intended to operate as an absolute delivery, or as a delivery to take effect on the performance of a condition is entirely a matter of fact to be ascertained from all the surrounding circumstances. It is well settled, however, that the mere retention of a deed after its execution by the maker of the deed does not of itself impair the validity of the deed or prevent its operating at once (1). A policy "signed, sealed and delivered" is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it; nor is it necessary that the assured should formally accept or take away a policy in order to make the delivery complete (2). The registration of a deed of sale constitutes sufficient delivery.

(1) *Doe d Garnons v. Knight* (1826), 5 B. & C., 671. See *In re Marine Insurance Certificate* (1894), 19 Bom., 130.

(2) *Xenos v. Wickham* (1863), L. R.,

of the deed in order to pass an interest in the property comprised in the deed (1).

When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of the contract, will be rejected ; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong (2).

Rule 1. Oral evidence cannot be received to contradict, vary, add to or subtract from the terms of a deed as between parties to the deed or their representatives in interest.(3)

It must be remembered that this rule is not, properly speaking, a rule of interpretation ; it is a rule of law limiting the subject-matter to be interpreted to that contained in the deed itself (4) ; and may be traced back to a remote antiquity. It is founded on the inconvenience that might result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke calls "the uncertain testimony of slippery memory" (5). If parties have made an executory contract which

(1) *Ponnayya v. Muttu* (1893), 17 Mad., 146.

(3) Ev. Act, s. 92.

(2) *Taylor*, 10th Ed., § 1132.

(4) *Elphinstone*, pp. 1, 2; *Norton*, 124.

(5) *Taylor*, § 1132.

is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging, or diminishing, or modifying the contract which is to be found in the deed itself (1). Thus, evidence to show that a deed of sale was intended only to operate as a security for the payment of a certain sum of money to the vendee was held to be inadmissible under this rule (2). Where the contract was for the delivery of 750 maunds of copper conditional on arrival within four months ; in a suit for damages for non-delivery, evidence to show that delivery was to be conditional upon one-fourth of the successive arrivals in certain godowns, amounting in the aggregate to 750 maunds was held inadmissible (3). Nor was the defendant in a suit upon a promissory note payable on demand allowed to give evidence to the effect that there was an oral agreement between the parties that the plaintiff should not bring any suit to enforce payment of the promissory note until the defendant's share in the compensation-money awarded in a certain land-acquisition case should have been received by him(4).

But it must be remembered that this rule can only be applied (a) when the document contains the whole of the agreement between the parties, (b) to parties to the

(1) *Per James, L. J., Ligott v. Barrett* (1880), 15 Ch. D., 309; and *per Brett, L. J., ib., 311.*

(2) *Banapa v. Sunder Das* (1876), 1 Bom., 333. See *Cohen v. Bank of Bengal* (1880), 2 All., 598.

(3) *Jadu Rai v. Bhobataran Nundy* (1889), 17 Cal., 173.

(4) *Ramjeebun Serowogy v. Oghore Nath Chatterjee* (1897), 25 Cal., 401; 2 C. W. N., 188. See *Ebrahim v. Cursetji* (1887), 11 Bom., 844; *Cowasji v. Burjorji* (1888), 12 Bom., 335. See *Kasim Mundu v. Sreemulti Noor Bebas* (1864), 1 W. R., 76.

deed and their representatives in interest, and (c) to cases in which some civil right or civil liability is dependent upon the terms of the document in question. Thus, extrinsic evidence may be given to show that the document does not contain the real agreement arrived at between the parties(1), or that it does not contain the whole of the agreement arrived at between them(2).

Secondly, any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove (3). So where the question was whether A, a pauper, was settled in a particular parish and a conveyance to which A was a party was produced purporting to convey land to A, for a valuable consideration, the parish appealing against the order was allowed to call A as a witness to prove that no consideration passed(4). Moreover, the words "between the parties to the deed" mean the persons who on the one side and the other come together to make the contract and do not apply to questions raised between parties on the one side only of a deed. Thus, in a suit for ejectment, where the property in suit had been conveyed to the plaintiff and the defendant jointly, the plaintiff was allowed to adduce oral evidence that he alone was the real purchaser, although in the deed of sale the defendant was described as one of the two purchasers(5).

Thirdly, any party to a deed, or any representative in interest of any such party, may prove any fact contradicting, varying, adding to or subtracting from the

(1) *Guddalu v. Kunnatter* (1872), 7 M. H. C. R., 189; *Pym v. Campbell* (1856), 6 E. & B., 370; *Harris v. Rickett* (1859), 28 L. J. Ex., 197.

(2) *Allen v. Pink* (1838), 4 M. & W., 140; *Behari Lall Dey v. Kamini Sundari* (1870), 14 W. R., 319; *Bholanath v.*

Kalipersad (1871), 8 B. L. R., 89, 92; *Cutts v. Brown* (1880), 6 Cal., 328.

(3) *Stephen*, Art. 92.

(4) *R. v. Cheadle* (1832), 3 B. & A., 833.

(5) *Mulchand v. Madho Ram* (1888), 10 All., 421.

terms of the deed for any purpose other than that of varying or altering any civil right or liability depending upon the terms of the document(1). So where the question was, whether A obtained money from B under false pretences, and it was shown that the money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence, B was allowed to give evidence of the false pretence, although he executed the deed mis-stating the consideration for the premium(2).

Fourthly, when a deed bears no date or an impossible or incorrect date, evidence is admissible to prove the date of delivery. A deed takes effect from the time of its delivery, not of its date. The date indeed is to be taken *prima facie* as the time date of execution, but as soon as the contrary appears, the apparent date is to be utterly disregarded(3). Where a deed bears no date, or an impossible date, and in the deed reference is made to the "date," that word must be construed "delivery;" but if the deed bears a sensible date, the word "date" occurring in the deed means the day of the date and not that of the delivery(4).

Rule 2. Extrinsic evidence may be given, which would invalidate any document, or which would entitle any person to a decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law(5).

In the cases contemplated by this rule the admission of extrinsic evidence does not violate Rule 1.

(1) *Stephen*, Art. 92.

N. S. Q. B., 50.

(2) *R. v. Adamson* (1843), 2 *Moody*, 286.

(4) *Styles v. Wardle* (1825), 4 *B. & C.*,

(3) *Per Patteson, J., Browne v. Burton*

908; *Elphinstone*, 123, *Norton* 175.

(1847), 5 *Dow & Lownd*, 292; 17 *L. J.*

(5) *Ev. Act*, s. 92, proviso 1.

inasmuch as it is adduced, not for the purpose of contradicting or varying the deed, but of proving that the deed ought not to be interpreted at all(1).

Agreements by way of wager are void(2), and extrinsic evidence may be given to show that an agreement in a deed is such an agreement(3). Instances where a party to a deed would be entitled to a decree or order relating thereto are given in illustrations (d) and (e) of s. 92 of the Evidence Act. Fraud, of course, vitiates all deeds, and when the execution of a deed has been obtained from a person by fraud, he will always be allowed to adduce extrinsic evidence to show that this was so(4). As to whether such fraud must be contemporaneous with the transaction or whether fraud subsequent to the execution of a deed can be pleaded for the purpose of invalidating it there is a conflict of opinion. Westropp, C. J., held that if the first proviso to s. 92 of the Evidence Act contemplated subsequent fraud, it would render the section nugatory(5), and Garth, C. J., also decided that the fraud contemplated by this proviso was fraud in the inception of the deed(6), basing his decision on certain paragraphs in Taylor's Book on Evidence(7). Melvill, J., on the other hand, held that it was not clear that these words were not large enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud(8).

(1) *Elphinstone*, 5, *Norton* 138.

(2) *Cont. Act*, s. 30.

(3) *Anupchand v. Champsi* (1888), 12 Bom., 585; *Eshoor v. Venkatasubba* (1894), 17 Mad., 480.

(4) *Monohur Das v. Bhagabati Dasi* (1867), 1 B. I. R., O. Q., 28; *Kashinath Chuckerbutty v. Brindabun Chuckerbutty* (1884), 10 Calc., 649; *Baboo Lall v. Joy Lall* (1897), 24 Calc., 593.

(5) *Banapa v. Sunder Dass* (1876), 1 Bom., 333. See *Preonath Shaha v. Madhu Sudan* (1898), 25 Calc., 606.

(6) *Cutts v. Brown* (1890), 6 Calc., 338.

(7) See *Taylor*, §§ 1132-6, *Kerr on Fraud*, 423.

(8) *Baksu v. Govinda* (1880), 4 Bom., 609. See *Rakken v. Alagappanthy* (1892), 16 Mad., 83.

Parol evidence may also (under a proper pleading) be given to show that the contract not disclosing these was really made for objects forbidden, either by Statute, or by common law; that such writing was obtained by improper means, such as duress; that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture, idiotcy, insanity, or intoxication; or that the instrument came into the hands of the plaintiff without any absolute and final delivery by the obligor or party charged(1).

A deed made without consideration is void unless it is made on account of natural love and affection in writing and registered or is a promise to pay a debt barred by the Law of Limitation(2). Consequently parol evidence may be given to show want or failure of consideration or that the actual consideration that passed was other than that stated in the deed(3).

Parol evidence will sometimes be admitted on equitable grounds, to contradict or vary a writing, which, by some *mistake in fact*, speaks a different language from what the parties intended, and it would consequently be unjust to enforce it according to its expressed terms(4). In all such cases, however, the party seeking relief undertakes a task of great difficulty, since the Court must be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really

(1) Taylor, § 1137.

(2) Cont. Act, s. 25.

(3) *Hukum Chand v. Hira Lall* (1876), 3 Bon., 159; *Vasudeva v. Narasamima* (1882), 5 Mad., 6; *Pogose v. Bank of Bengal* (1877), 3 Calc., 174; *Lalla Him-mut v. Llenohellen* (1885), 11 Calc., 486; *Kumara v. Srinivasa* (1887), 11 Mad., 213; *Indayet v. Lal Chand* (1895), 18

All., 163; *Sah Lal Chand v. Indrajit* (1900), 22 All., 370; 4 C. W. N., 485; 27 I. A., 93; *Kailash Chunder Neogi v. Harrish Chunder Biswas* (1900), 5 C. W. N., 158.

(4) Taylor, § 1139; *Baboo Dhunput Sing v. Shaikh Jowahir Ali* (1867), 8 W. R., 152; *Mahendra Nath Mukerjee v. Jogendra Nath* (1897), 2 C. W. N., 260.

exists, and next that it is such a mistake as ought to be corrected(1).

Rule 3. The existence of any separate oral agreement as to any matter on which a deed is silent and which is not inconsistent with the terms of the deed may be proved(2).

No evidence is admissible under this rule if the oral agreement sought to be proved is inconsistent with the terms of the written instrument(3). Where a promissory note is silent as to payment of interest, a subsequent agreement to pay interest may be proved(4).

In considering, however, whether or not evidence ought to be admitted under this rule, the Court has regard to the character and formality of the document (5), evidence being more readily admitted where the document is of an informal character (6).

Rule 4. The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under a deed may be proved (7).

This rule does not clash with Rule 1, for it does not admit evidence to contradict, alter or vary the terms of a deed. Where there exists a condition precedent to the document becoming a valid and operative document, the document cannot be construed until such condition is performed. The subject-matter of the condition precedent is *dehors* the contents of the deed ; and until the condition is performed, there is in fact no written agreement at all (8). But this rule does not apply

(1) *Taylor*, § 1139.

(2) *Ev. Act*, s. 92, Proviso 2.

(3) *Ebrahim v. Curperji* (1887), 11 Bom., 614; *Cowasji v. Burjorji* (1888), 12 Bom., 335.

(4) *Umesh Chunder v. Mohini Mohun* (1881), 9 C. L. R., 301; *Sowdamonee Debya v. A. Spalding* (1882), 12 C. L. R., 163.

(5) *Ev. Act*, s. 92 Ills. (g) and (h), *Mayen v. Malden* (1892), 16 Mad., 254.

(6) *Umesh Chunder v. Mohini Mohun* supra

(7) *Ev. Act*, s. 92, Prov. 3.

(8) *Bell v. Ingestre* (1848), 12 Q. B., 317; *Davis v. Jones* (1856), 17 Q. B., 625; *Pym v. Campbell* (1856), 6 E. & B., 370; *Ampa Gurubala v. Krishnarao*

to a case where the written agreement has not only become binding, but has actually been performed as to a large portion of its obligation; and the words "any obligation" mean any obligation whatever under the contract and not some particular obligation the contract may contain (1).

Rule 5. Any usage or custom by which incidents not expressly mentioned in the deed are usually annexed to contracts of the description of the one contained in the deed may be proved: Provided that the annexing of such incidents would not be repugnant to or inconsistent with the express terms of the deed (2).

Provided they are not inconsistent with the contract, it is allowed to *supply terms of known usage* in control of the contract, and which is known by the expression of "annexing incidents." This is upon the principle that the contract was itself framed *with reference to the usage*; and so as to incorporate the usage in, and as part of itself. Indeed, it is in part also upon this principle, that even as respects *the actual terms of the contract, it is by the usage they are expounded* (3). These incidents are sometimes the creatures of mere usage. But usage may come at length, by judicial recognition, to be regarded as part of the *law merchant*, and this would be obligatory without special evidence. Consequently, the law merchant annexing to a Marine Insurance the condition of *sea-worthiness* at the commencement of the voyage, it would *ipso facto* become annexed to any ordinary contract of such insurance (4). But

(1863), 1 M. H. C., 457; *Dada Honaji v.*

Babaji (1865), 2 B. H. C., 38; *Guddalu*

v. *Kunnalter* (1872), 7 M. H. C., 189;

Jugtanand v. Nerghan (1880), 6 Calc.,

435; *Tiruvengada v. Rangasami* (1883),

7 Mad., 19.

(1) *Jugtanand v. Nerghan*, *supra*.

(2) Ev. Act, s. 92, Proviso 5.

(3) *Goodeve, Ev.*, Ed. 1871, p. 375.

(4) *Ib.*, 376; *Humfrey v. Dale*, 1856-7

W.R.(Eng.), 467; *Koonj Behari v. Shiva*

Baluk (1887), Agra R. F. R., 128; *Hari*

Mohan Bysack v. Krishna Mohun Bysack

(1872), 9 B. L. R., App. 1.

custom cannot affect the express terms of a written contract(1), nor can a custom at variance with, or *repugnant to, the express terms of a deed be proved* in evidence (2). In order that a practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract : and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees (if any) for value knew that the practice was a term of the original contract (3).

These five rules may be shortly summarized as follows. Extrinsic evidence is not admissible to alter, add to, contradict or vary the express terms of a deed where the deed contains the whole of the agreement between the parties, but it is admissible to show that the deed is invalid, that it does not contain the real agreement arrived at between the parties, that there is a collateral agreement not inconsistent with the deed, that there is a condition precedent to be performed before the deed can come into operation, and that incidents about which the deed is silent are by a well recognized usage or custom annexed to the terms set forth in the deed.

(1) *Indur Chunder v. Luchmi Bibi* L. R., 459; *J. G. Smith v. Ludha* (1871), 7 B.L.R., 682; *Morris v. Panchanada* (1892), 17 Bom., 143.

(2) *MacFarlane v. Carr* (1872), 8 B. 275.

(3) *Manu v. Rama* (1897), 20 Mad.,

LECTURE III. (I).

In addition to the extrinsic evidence allowed by Rules 2 to 5, another description of evidence is admissible to assist the Court in the interpretation of a deed. This evidence helps to explain the sense in which the parties understood the deed at the time they executed it, and the Rule as regards the admissibility of such evidence is embodied in proviso (6) of section 92 of the Indian Evidence Act and may be stated as follows :--

Rule 6. Evidence is admissible of every material fact that will enable the Court to identify the person or thing mentioned in the instrument and to place the Court whose province it is to interpret the deed as near as may be in the situation of the parties.

For the purpose of applying the deed to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, *viz.*, every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court whose province it is to declare the meaning of the words of the instrument as near as may be in the situation of the parties to it. The authorities for this position are numerous ; they are referred to in Vice-Chancellor Wigram's excellent Treatise on the admission of extrinsic evidence under the 5th proposition (p. 53, 3rd Ed.). From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its

duty to construe and apply the words of that instrument(1). In that case a settlor conveyed estates upon trust to pay certain sums to such poor and godly preachers for the time being of Christ's Holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of Christ's Holy Gospel as the trustees for the time being should think fit, and extrinsic evidence was admitted to show that the settlor by the words "poor and godly preachers of Christ's Holy Gospel" referred to a sect of Protestant dissenters who called themselves Independents.

Up to a certain point and apart from any question of ambiguity extrinsic evidence would be necessary to point the operation of the simplest instrument. Thus, were it the case of a deed conveying all the lands at *A* in the grantor's occupation, until it was defined by proof what lands were in his occupation, the operation of the deed could not be known. The principle cannot be affected by the construction that a more ample development of circumstances is necessary in one case than another(2). In interpreting any instrument which purports to deal with property, some extrinsic evidence is necessary in order to make the words, which are but signs, fit the external things to which those signs are appropriate. In reality external information is requisite in construing every instrument; but when any subject is thus discovered, which is not only within the words of the instrument, according to their natural custom, but exhausts the whole of those words, then the investigation must stop; you are bound to take the interpretation which entirely exhausts the whole series of expressions used by the author of the instrument, and are

(1) *Per Parke, B., Shore v. Wilson* (1842), 9 Cl. & F., 355, at p. 356. (2) *Goodeve, Ev.*, 332.

not permitted to go any further(1). These observations are cited only as illustrative of the principle. Practically, it is upon some imperfection of the instrument, as applied to the facts, that the difficulty as to determining its meaning arises ; and nothing is more settled than that evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing their light on its interpretation. Indeed, it is by these as by a lamp the Court reads the document(2). We have already seen that under Rule 1 evidence of the conduct of the parties is not excluded where such conduct is relevant ; and evidence of the subsequent conduct of the parties was held admissible in the case of *Kashee Nath Chatterjee v. Chundy Churn Bannerjee* (3) to show whether an instrument which on the face of it purported to be a deed of out-and-out sale was only intended by the parties to operate as a mortgage. In *Daimodee Paik v. Kaim Tarida* (4) which was decided by the Calcutta High Court after the Evidence Act had been passed, it was held that section 92 of the Evidence Act had altered the law as laid down in *Kashee Nath Chatterjee's* case and was a bar to the kind of evidence which was held admissible in that case. On the other hand, it has been held by the Bombay High Court (5), by the Madras High Court (6) and by the Calcutta High Court in *Hem Chunder Soor v. Kally Churn Dass* (7) and *Kasi Nath Dass v. Hurrihur Mookerjee* (8) that section 92 of the Evidence Act does not alter the rule laid down in *Kashee Nath Chatterjee*

(1) *Per Wood, V. C., Webb v. Byng* 1855. 1 K. & J., v. 580, at pp. 585-586.

C. L. R., 386 (1878)

(5) *Bakshu Lakshman v. Govinda Kanji*, 4 Bom., 594 (1880).

(2) *Goodeve, E.v.*, 382.

(6) *Venkataratnam v. Reddiah*, 13 Mad., 494 (1890).

(3) 5 W. R., 68 (1866).

(7) 9 Calc., 528 (1883).

(4) 5 Calc., 300-302 (1879). See *Ram Doyal Bajpie v. Hura Lall Paray*, 3

(8) 9 Calc., 898 (1883).

v. *Chundy Churn Bannerjee*, and that the ground upon which the evidence of acts and conduct is admitted is that the Court should not permit the perpetration of a fraud. In addition to the cases cited here, the principle laid down in the last mentioned case have been followed by several other cases. The question came up again before a Full Bench of the Calcutta High Court in the case of *Preo Nath Shaha v. Madhu Sudan Bhunja*(1). There it was not contended that the evidence sought to be admitted was inadmissible, and the Court held that in a case where the question is whether a deed which purports to be an out-and-out sale was only intended to operate as a mortgage, the acts and conduct of the parties are admissible to show what the true nature of the deed is.

The principle on which the rule is applied is this, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, and not as a sale, the Court will give effect to it as a mortgage and not as a sale; and thereupon, the Court will, for that purpose, allow parol evidence to be given of the original agreement (2). In a suit for redemption of land mortgaged to the defendant, the plaintiff relied upon a document as containing an acknowledgment of the title of the plaintiff under section 15 of the Limitation Act (XIV of 1859). The document contained an admission by the defendant that he held land upon

(1) 25 Calo., 603 (1898); 2 C.W.N. 564.

(1) *Per Melvill, J., Bakshu Lakshman*

v. *Govinda Kanji*, 4 Bom., at p. 609.

(1880).

mortgage in a specified district from the temple of which the plaintiff's were the trustees. It was held that oral evidence was admissible to apply the document to the land to which it was intended to refer (1). Again, when a letter had been addressed by the defendant to a Mrs. W., containing an acknowledgment of a debt, it was held that evidence was admissible to show that Mrs. S., the plaintiff, was known as Mrs. W. and also for the purpose of identifying the debt to which the acknowledgment referred (2).

This rule to a certain extent embodies the old Latin maxim "*Contemporanea expositio est optima et fortissima in lege*" (3).

The short exposition of the whole matter is, that the knowledge of the external circumstances of which their proof puts the Court in possession, places the judge in the position of the donor, settlor, or other party to the instrument; and it is upon the survey which that position affords him, he exercises the office of an expositor.

Rule 7.—When the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words (4).

By "literal meaning" is intended not necessarily the primary or etymological meaning, but (a) the meaning usually affixed to the words at the time of the execution of the deed, by persons of the class to which the parties

(1) *Valampuducherri v. Chowakaren*, 5 Mad. H.C.R., 320 (1870). mode of expounding an instrument is by referring to the time when, and

(2) *Umesh Chundra Mookerjee v. E. Sugerman*, 5 B.L.R., 633 (n) (1869). circumstances under which, it is made.

(3) 2 Inst. II. The best and surest

(4) Norton, 56.

belonged ; or (b) the meaning in which the words must have been used by the parties, having regard to their circumstances at the time of execution ; or (c) the meaning which it can be conclusively shown that the parties were in the habit of affixing to the words.

The literal meaning of technical words in a deed relating to the art or science in which such words are used is their technical meaning.

Extrinsic evidence is admissible for the purpose of determining the literal meaning of the words used and for no other purpose.

Hence evidence is admissible to show who the parties to the instrument are, the circumstances under which the instrument was executed and the meaning which they were in the habit of affixing to any words used (1).

Where in a joint conveyance by a widow and the next reversioner in which they conveyed "the whole and entire property absolutely" it was held that they had exercised every power which they possessed, and that they parted with their whole interest whether in possession or expectation, and that the title of the alienee was complete (2). The word "*sontan*" has been construed as meaning "issue" generally and to include daughters (3). The word "*naslan-bad-naslan*" confers absolute ownership (4).

The rule that technical words must bear their technical meaning in instruments relating to the art or science to which they belong, is of the greatest importance in the interpretation of mercantile contracts (5). In construing a *usual* mercantile contract, the question

(1) *Ib.*, 56, 57.

7 W. R., 320.

(2) *Mohunt Kishen Geer v. Basgeet Roy* (1870), 14 W. R., 379.

(4) *Thakur Harihur v. Thakur Umam* (1886), 14 I. A., 7; 14 Calc., 296.

(3) *Kinto Kishore v. Seetamonee* (1867),

(5) *Norton*, 69.

is, in what sense have the terms been used in similar contracts. In the case of an *unusual* contract, have the terms acquired any, and what, peculiar meaning in general mercantile language or in the particular trade(1) ?

The principle of this rule has been incorporated in section 94 of the Evidence Act which enacts that when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. The true construction of an agreement depends upon the ordinary meaning of the words used, and if these words are plain and unambiguous, it is quite clear that they must not be explained away by extrinsic evidence, and still less by mere reasoning from probabilities. There is no duty of a Court of Justice more imperative than that of upholding contracts into which parties have voluntarily entered under no mistake of fact (2). Thus, an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be a conveyance and become a mortgage because there is a right to repurchase (3).

(1) *Lewis v. Marshall* (1844), 7 Man. and Gr., 729. On the present occasion, the question was, whether there was a recognized practice and usage with reference to the voyage and business out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used these words in such sense.

The character and description of evidence admissible for that purpose is, the fact of a general usage and practice prevailing in the particular trade or business, not the judgment or opinion

of witnesses ; for the contract may be safely and correctly interpreted by reference to the fact of usage ; as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto ; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge ; *per* Tindal, C. J., *ib.* at p. 744. See *Smith v. Ludha* (1892), 17 Bom., 144.

(2) *Alagaiya v. Saminada* (1863), 1 Mad. H. C., 264 at p. 269.

(3) *Bhagwan Sahai v. Bhagwan Din* (1890), 17 I. A., 98 ; 12 All., 387.

Rule 8.—Where, if the words in a deed are used in their literal meaning, an absurdity or inconsistency appears, such of the other meanings that they properly bear may be placed upon them to avoid that absurdity or inconsistency (1).

When general words are employed, they must be so understood, unless they are accompanied by any expression limiting and restraining their ordinary meaning, or unless such limitation or restriction arises from necessary implication(2). From all the cases upon this subject it appears to be determined, that, however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words. The question, therefore, always has been, whether such an irresistible inference does arise? For if such an inference does arise from concomitant covenants they will control the general words of an independent covenant in the same deed(3). It is, however, incumbent on those who contend for the limited construction to show that a rational interpretation ... requires a departure from that which ordinarily and *prima facie* is the sense and meaning of the words(4). But general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated (5), and where a deed speaks by general words, and afterwards

(1) This is adapted from Lord Wenshydale's Golden Rule, *Gray v. Pearson* (1857), 6 H. L. C., 61, at p. 106.

(2) *Per Mahmood, J., Sheoratan v. Mahipal* (1884), 7 All., 258 at p. 270.

(3) *Per Alvanley, C. J., Hesse v. Stevenson* (1803), 3 B. & P., 565 at pp.

574, 575. (4) *Per Knight Bruce, V. C., Parker v. Marchant* (1842), 1 V. & C., 290 at p. 300; 11 L. J. Ch. 223 at p. 226.

(5) *Per Erle, Q. J., Harrison v. Blackburn* (1864), 17 C. B. N. S., 678 at p. 680; 34 L. J. C. P., 109 at p. 112.

descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words (1).

Where under an instrument a debtor allotted to his creditor his "aivaj" on account of Deshpande Hak and Inámi recoverable from the villages and undertook not to meddle till the "aivaj" was paid, and the instrument did not describe the lands mentioned therein by metes and bounds, but only as being in the occupation of certain persons paying so much rent, and contained a clause that the "aivaj" of Rs. 63 (the sum total of rents) had been allotted and that the creditor might take kabuláyats from the occupants and make the recoveries, it was held that the term "aivaj," although capable of meaning property generally, must from the context of the document mean moneys or sums. And it was further held that the language of the instrument showed a clear intention to appropriate the rents as distinguished from the lands themselves, so that even if the transaction were regarded as a mortgage, it could only be a usufructuary mortgage, which would confer no right to have the property sold (2). You must look at the words of a deed with reference to the parties who use them, and the grant must be consistent with that; consistent with the interests of those who make the grant. So where a deed of arrangement and release in the English form, between members of a Hindu family in respect of certain joint estate, claimed by a childless Hindu widow of one of the co-heirs, in her character of heiress and legal personal representative of her deceased husband, declared that she was entitled to the sum therein expressed, as the share

(1) 4 Coke, p. 449, Part VIII, 154-b,
Altham's Case.

(2) *Hannant Ramchandra v. Babaji Abaji* (1891), 16 Bom., 172.

of her deceased husband, "for her sole absolute use and benefit," it was held that those words were not to receive the same interpretation as a Court of Equity in England would put upon them, as creating a separate estate in the widow; but that the deed must be construed with reference to the situation of the parties and the rights of the widow by the Hindu Law, and that, as the deed recited that she claimed and received the money as her husband's share in the joint estate in her character as his heiress and legal personal representative, such words must be construed to mean, that it was to be held by her in severalty from the joint estate; and as a Hindu widow she had only a life-estate in the *corpus*, the same at her death devolved as assets of her deceased husband upon his personal representative in succession. (1)

Rule 9. Extrinsic evidence may be given to explain a latent but not a patent ambiguity in a deed. (2)

Latent ambiguity, in the more ordinary application of the term, arises from the *existence of facts external to the instrument*; and the creation, by those facts, of a *question not solved by the document itself*. (3) A *patent ambiguity* is that which exists either,—in the *want of adequate artificiality* in the composition, including under the term, expressions requiring interpretation,—or the *omission of something requisite to give operation to the document*.

Thus, in the *former* case, the language may be not only *inartistic*, but *confused, contradictory, and generally incomprehensible*; or it may exhibit a capacity of *double meaning*, with no adequate solution as to *which*

(1) *Sreemutty Rabutty Dasses v. Sib Chunder Mullick* (1854). 6 M. I. A., 1.

(2) Ev. Act., ss. 93, 95.
(3) *Goodeve*, 390.

meaning was intended ; or it may use *terms of art*, or *terms otherwise not intelligible* without explanation. If, with the aid of such extrinsic evidence as may be necessary to clear up *unintelligible* or *equivocal* expressions, the Court cannot struggle through the maze, the instrument itself must fail for want of adequate expression ; and, in attempting to solve the meaning, the Court is not at liberty to indulge in mere conjectural surmise ; it must be governed by the ordinary rules of legal construction. In a medium of total darkness the eye could not exercise its power of vision ; and the mind would not be allowed to *speculate* on what could not be *seen*.

In the *latter* case we have put, the instrument may *omit the very essence of its intended operation*. Thus, a blank may have been left for the *subject* or *person* to be dealt with, or to take, say—in a deed the property intended to be passed ; in a contract the thing bought ; or, if not a total blank, what is tantamount to it, as a gift to Lady——without saying *what* Lady. Here the blank cannot be supplied.

The province of the Court is to *interpret*, not to *make*. It is to *construe* the expressions which the parties have themselves furnished, not to *supply* others. For cases such as these, extrinsic evidence of mere surrounding facts would, from the nature of things, afford no remedy. Were the Court, by the process of construction, to insert in the blank the property or the thing omitted, *which*, of the sons was meant by the gift to one, or *who* was the Lady——this would be to *supply*, not to *interpret* ; and, though the law admits evidence to *explain*, it excludes that which would only be to *add to*. Hence it is laid down that, *in a case of patent ambiguity, parol evidence is inadmissible.* (1)

Where a pattah purports to convey so many beegahs of land "more or less" within certain boundaries, the test of what is really conveyed is not the area of the land but its boundaries. (1) An equivocation arises where no ambiguity is apparent on the perusal of the deed to a person unacquainted with the circumstances of the parties, but after evidence of the circumstances of the parties is obtained, it is discovered that there are several persons or things, or classes of persons or things, to each of which a name or description contained in the deed seems to be equally applicable. (2)

When after all the extrinsic and intrinsic evidence admissible under the preceding rules has been exhausted, a name or description still remains equivocal. *then and not till then*,—extrinsic evidence of what was passing in the minds of the parties to the deed at the time of execution is admissible for the purpose of determining which of the several persons or things, or classes of persons or things, described by the equivocation the parties intended, and for no other purpose whatsoever. (3)

But if one part of the description applies to one object, and another part applies to another object, but the description as a whole applies to no object, the case is similar to that of a patent ambiguity, and direct evidence of intention is not admissible. (4)

(1) *Sheeb Chunder Maneekh v. das v. Mahomed Ali* (1880), 5 Bom., 208, *Brojonath Aditya* (1870), 14 W. R., 301; (2) *Norton*, 96, *Esan Chunder Ghose v. Protah Chunder* (3) *Ib.*, 104, *Roy* (1873), 20 W. R., 224. See *Virjean-* (4) *Ib.*, 110.

LECTURE IV.

THE previous Rules respecting the interpretation of deeds, deal mainly with the cases in which the Court is allowed to have recourse to extrinsic evidence in order to obtain assistance in interpreting a deed and cases in which it is not so allowed. Before discussing the other rules applicable to the interpretation of deeds it may perhaps not be out of place to consider the component parts of a deed and the bearing each one has to the rest. In an English deed there is a regular prescribed order in which the various parts of a deed appear. By an Indenture was originally meant a deed where the top of the paper or parchment is cut and indented. In old times, when the deed was in two parts, they were both written on the same skin, which was afterwards cut through in a wavy manner, and generally a word was written along the line of division before they were cut asunder in such a manner that it was cut through, so that afterwards it could be seen that the two parts were what they professed to be by their fitting into each other. These two parts were called "counterparts" or "counterpanes," and when put together, constituted the contract by deed. Now counterparts are not written on the same skin, and in practice the part executed by the person from whom the estate moves is called the "original" and the part executed by the person accepting the estate is called "the counterpart." When both parts are executed by each party, they are called "duplicate originals."

Gradually the custom of indenting the deed has died out ; and now, by "an indenture" we only mean a deed that has parties of more than one part. Nowadays it is unnecessary for a deed purporting to be an indenture to be actually indented. (1)

Deeds-poll are so called because they were formerly *polled* or cut even at the head. The term is now applied to deeds where the persons executing are all of one part. The greater part of deeds-poll are powers of attorney or deeds exercising powers in a settlement or will, as, for instance, a deed appointing a portion. Some of the statutory forms of Conveyance to Railway Companies are very badly expressed deeds-poll.

It is usually the practice to put a date to a deed ; in indentures the date is usually placed at the beginning of the deed, in deeds-poll at the end of the testimonium clause. But, as we have seen before, deeds in point of obligatory force with a view of priority of title take effect from, and therefore have relation to, the time not of their date but their delivery, and so it follows that if the date be impossible or be omitted, or if the date stated in the deed be different from that of the time of delivery, the deed takes effect from the latter time. If several inconsistent deeds be executed, they take effect according to the several times of their delivery and not of their date.

As a matter of convenience the name of every person whose intentions are expressed by any instrument should be formally stated. When all the persons have identical intentions, they generally express them by means of a deed-poll ; but when this is not the case, they do so by means of an indenture, and are said to be made parties to it ; those who have identical intentions being made

(1) Elphinstone, *Introduction to Conveyancing* (3rd Ed.), p. 58.

parties of the first part. The phrase "identical intentions" requires a little explanation: in a common contract for sale from *A* to *B*, although at first sight it may appear that the intentions of *A* and *B* are the same, yet this is really not the case: *A*'s intention is to part with his property and receive the money; while *B* desires to part with his money and receive the property: their intentions are different, and accordingly in the deed declaring their intentions they would be made parties of different parts; while, on the other hand, if the sale were made to two persons *B* and *C*, as trustees for instance, they would have identical intentions differing from those of *A*; so that *A* would be of one part and *B* and *C* of the other.

The date and names of the parties are stated at the beginning of an indenture in the following form: "This Indenture made the day of between *AB* of of the first part, *CD* of of the second part and *EF* of of the third part." The parties being expressed to be of as many parts as are necessary, the parties of the last part being introduced by the word "and." If the parties be of two parts only, they are said to be "of the one part" and "of the other."

The formal method of stating the parties to a deed-poll varies according as it does or does not contain recitals; in the former case it begins, "To all to whom these presents shall come *AB* of, etc., sendeth greeting"; in the latter case it begins, "Know all men by these presents that I, *AB*, of &c." The date being in each case mentioned in the testimonium clause.

In contracts not under seal the form is immaterial, but when they are prepared in a formal manner, the commencement is generally the same as that of an

indenture, substituting the words, "Memorandum of Agreement" or "Articles of Agreement" for "This Indenture." Where the contract is long, and is, according to a usual and convenient practice in such cases, divided into numbered paragraphs, the heading "Articles of Agreement" is more often used than "Memorandum of Agreement," but it is entirely immaterial.

The parties to a deed are always described by their names and additions, that is to say, by their dwelling places and qualities. There is no strict rule as to the minuteness of description necessary; all that is required is to describe the parties with such a degree of accuracy that no confusion will arise. (1) Sometimes it happens that a party to a deed was party to some former deed relating to the same property, in which he was described differently; in this case both the present and the old description of such a person is given as *AB* of No. 8, Middleton Street, in the town of Calcutta, but formerly of No. 11, Mall Road, Naini Tal, in the North-West Provinces. It is very frequently the case to annex to the description of a party the character in which he acts and afterwards call him by that name throughout the conveyance. Thus in a mortgage the parties frequently run as follows:—

"*AB* of hereinafter called the mortgagor of the one part and *CD* of hereinafter called the mortgagee of the other part," and afterwards throughout the deed the parties are simply referred to as mortgagor and mortgagee respectively.

The order in which the parties are arranged is very much a matter of custom. Usually in a conveyance the conveying parties come before those to whom the interest is conveyed; the persons having the legal estate,

(1) Elphinstone, *Introduction to Conveyancing* (3rd Ed.), pp. 59-61.

whether owners, trustees or mortgagees, come first; they are followed by incumbrances, such as second mortgagees, annuitants; the person entitled to the beneficial interest subject to the charges, coming after his incumbrancers; the persons to whom the conveyance is made coming after those who convey; trustees inserted for the interest of the persons to whom the conveyance is made, generally come last of all. (1)

Recitals as a rule are placed immediately after the parties and their additions. A recital is not a necessary part of a deed, and therefore if there is a discrepancy between the recitals and the operative clauses, and the latter are clear and unambiguous, the recitals will not control them. (2) This principle will be discussed in greater detail later. In most cases it is convenient to arrange the recitals in chronological order. The exceptions may be ranged under the following heads: (a) Where the deed has reference to more than one distinct property: in this case it is generally more convenient to trace the dealings with each property separately down to the time when they were first dealt with together. Thus, in a deed of exchange, the dealings with the two properties should be kept entirely distinct. (b) Where the deed deals with more than one estate in the same property which have always been dealt with separately. Thus, where a term has always been kept distinct from a fee, and they are dealt with in the same conveyance, the recitals respecting them may very conveniently be kept distinct.

Recitals are divided into *narrative* recitals, which are either general or particular, and *introductory* recitals. The narrative recitals are so framed as to show the

(1) Elphinstone, *Introduction to Conveyancing* (3rd. Ed.), p. 65.

(2) *Ib.*, p. 67.

nature of the interest intended to be dealt with. If the person who conveys the property has an absolute estate in it, they commence with the recital of his absolute estate or with the deed by which it was conveyed to him ; if he have only a limited estate, they commence generally with the creation of his interest, and trace down all the dealings with it to the time of the execution of the deed in preparation. If the first of the recitals be a deed, it is unnecessary, as a general rule, to show why or by whom the interest was created, and the recital is called a *general* recital. (1) The introductory recitals are so framed as to explain what is intended by the deed. Care should always be taken to make them correspond exactly with what is subsequently done in the operative part of the deed.

The next clause in order is that which sets out the consideration for the deed ; for by the consideration for a contract or deed is meant the motive that affects the parties. Consideration is of two kinds, valuable and good. What amounts to a valuable consideration, or, as it might with greater propriety be called, a consideration valid at law depends upon the circumstances of each case. Money, marriage, doing something which is troublesome to oneself or to the use of the other party to the contract are all valuable considerations. Thus, if I simply agree with you to give you five rupees, there is no consideration for my promise, and the law will not give you damages if I omit to perform the agreement. But if I were to agree with you to give you Rs. 5, if you would walk half a mile and you were to perform your part of the contract, there would be a consideration for my promise ; *viz.*, the trouble that you have taken in walking the half mile. If I were to promise to give you dinner at

(1) Elphinstone, *Introduction to Conveyancing* (3rd Ed.), p. 68.

my house if you would come at a certain time, and you were to come, there would be a binding contract, the consideration for the dinner being the trouble that you would have had in coming. On the other hand, if we were to agree that I should at my expense send to you at your house a dinner from the Cook's shop, there would be no consideration moving from you, and the law would not hold me to my promise.(1) A good consideration merely means the motive of natural affection towards relations, and it has no validity as against creditors or purchasers. The consideration is always stated in words at length in the first witnessing clause ; and where there is more than one witnessing clause it is referred to in the subsequent witnessing clauses, as "the consideration aforesaid," and immediately after the consideration follows the clause acknowledging its receipt.

The next part is the operative portion of the deed, and it is the practice amongst unskilful draftsmen to use a great many words without having regard to their true meaning, and also to use them both in the past and present tense ; thus, in a release founded on a lease for a year, the words sometimes used are "He the said *A/B* hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm." Here all the words with the exception of "grant and release" are simple surplusage and in the recital of the deed those two words would be the only operative words mentioned.

The occasions for the employment of the various operative words are the following : *Appoint* in the execution of a power : if the power contains any special words, they are usually followed. "*Assign*" in a conveyance of personalty or movable property. "*Alien* (now

(1) Elphinstone, *Introduction to Conveyancing* (3rd Ed.), p. 77.

disused), absolutely parting with an estate. *Confirm* where there has been a previous conveyance to the grantee and it is intended to confirm it. *Convey* may be used in a conveyance of property of any nature. *Grant* was formerly in England the proper word for conveying freeholds not lying in livery. *Livery* was the act of giving or taking possession of, now abolished by 7 and 8 Vic., c. 76 and 8 and 9 Vic., c. 106, and the word 'grant' is the operative word now generally used in the conveyance of freeholds. *Surrender* is the conveyance of a term to the intent that it may merge : *Release* is the conveyance of a remainder or reversion to the person in possession or to release either property or a person from any claim. *Remise release and quit claim* the old form of releasing property from a claim. *Acquit release and quit claim* the old form of releasing a person from a claim. *Demise* formerly *demise lease and to farm* let the word used in granting a term. (1)

The parcels are generally inserted in the operative part of the deed, although in some few exceptional cases, as in the assignment or surrender of a lease, the transfer of a mortgage not by endorsement or the appointment of a new trustee, they may be more conveniently set out, if at all, in the recital of the lease, mortgage or settlement and be conveyed by reference. They should be described according to their quality, as arable land, woodland, and the like, their quantity, etc., according to their measurement with their abuttals and the names of the occupiers. The description may be given only in the body of the deed or which is generally more convenient with the aid of a schedule to the deed and an endorsed map. In cases where intermixed or adjacent land, held on different titles, is dealt with by the same

(1) Elphinstone, *Introduction to Conveyancing* (3rd Ed.), pp. 90-92.

deed, the use of several schedules will generally be found to facilitate the draftsman's task.(1) There is much difficulty in understanding the rules for the interpretation of parcels. The following remarks may, perhaps, render them more intelligible. A thing is always designated (a) by what is called a general name (that is, a name which is equally applicable to every member of a class) together with (b) some superadded description to show which member of the class is intended. For instance, "a house," "an estate," "a farm," "a wood," are all general names ; each of them equally fits every member of a class. There are two modes of designating or identifying any particular member of a class. *First*, we may describe the thing by several general names ; in other words, we may describe it as belonging to several classes. In this case, if only one thing satisfies all the descriptions, that is the thing meant ; if more than one thing satisfies all the descriptions, there is a case of equivocation. It often happens that the same thing can be described by two totally different descriptions, *e.g.*, the same lands may be described by the two descriptions following "the tithe free lands in the parish of *E*" and "the ancient woodlands inherited by *A*." In each of these descriptions all the names are general, and in each case if we omit any one of the general names, we describe a larger number of things than if we use all the names ; in other words, where a thing is described by several general names, the descriptions are mutually restrictive. *Secondly*, we may add to the general description either the individual name, if there be one, or a special description which fits that member only of the class of things designated by the general description. Thus the pieces of land before described may be described as

(1) Elphinstone, *Introduction to Conveyancing* (3rd Ed.), p. 93.

“the woods called Highhurst” or “the woods in the occupation of *A.*” More commonly, however, we add to the general description both the individual name and special description as “the ancient woodlands in the parish of *E* known as Highhurst in the occupation of *A.*” It will be observed that if a description, though general in form, does in fact designate one thing only, the addition of any special description is useless ; but if, as usually happens, a general description points equally at more than one thing, the special description indicates which of these things is meant ; in other words, if any thing exists which satisfies both the general and the special description, that only is intended, *i.e.*, the special description restricts the general description.

Where the parcels are described by several general descriptions, or by a collective and a general description, that only is intended which satisfies each description ; or in other words, general descriptions are mutually restrictive. If the parcels are described as being members of more than one class, that only is intended which is a member of each class. Where the parcels are described by general or collective and also by special descriptions and anything fits both descriptions, that only is intended. In such cases the Latin maxim *Non accipi debent verba in demonstrationem falsam qui competit in limitationem veram* applies ; that is to say, if it be doubtful upon the words whether they import a false reference or description, or whether they be words of restraint, limiting the generality of the former name, the law will not intend error or falsehood, for where words can be applied so as to operate on a subject-matter and limit the other terms employed, in its description, or where there is a subject-matter to which they all apply, it is not possible to reject any of those

terms as a false description. If, therefore, I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true, and if a man pass lands, describing them by particular references all of which references are true, the Court cannot reject any one of them.

Where the parcels are described by both general or collective and special descriptions and nothing exists which satisfies all the descriptions, but something exists which satisfies some of them and is described with sufficient certainty, the others may be disregarded. This introduces the principle of *Falsa demonstratio non nocet*.

Rule 10. A deed should be interpreted, so as to take effect, if possible, according to the intention of the maker or makers.

The principle of this rule has already been dealt with under Rule B in Lecture I. (1) If a deed can therefore operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent. (2) I shall lay down some general rules and maxims of the law with respect to the construction of deeds. *First*, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of deeds should take effect rather than the contrary. Another maxim is, that such a construction should be made of the words in a deed,

(1) *Ante*, p. 3, *et seq.*

Bailey (1777), 2 *Cowp.*, 597, 600; *Ford*

(2) *Solly v. Forbes* (1820), 2 *B. & B.*, 38; *per Dallas, J.*, pp. 48, 49; *4 Moo. Ex. R.*, 448, 463; *Goodtitle v. Edwards* v.

v. Buch (1848), 11 *Q. B.*, 852, 870; 17 *L. J. Q. B.*, 114, 117.

as is most agreeable to the intention of the grantor ; the words are not to the principal things in a deed, but the intent and design of the grantor. (1)

Rule 11. When the intention of the maker or makers of a deed cannot be given effect to its full extent, effect is to be given to it as far as possible.

A deed that is intended and made to one purpose may enure to another, for if it will not take effect in the way it is intended, it may take effect in another way, provided it may have that effect consistently with the intention of the parties. And, therefore, a deed made and intended for a release may amount to a grant of a reversion, an attornment, or a surrender or *é converso*. (2) Where a deed provided for a payment of Rs. 25 "as *malikana*" it was held that the words "as *malikana*" showed an intention that the payment of Rs. 25 should be an annual charge on the property, and the profits arising therefrom analogous to that of a *malikana* reserved on a settlement by a Government settlement officer ; that the use of these words was intended to reserve and create a perpetual and heritable charge upon the property ; and that the Court was not prevented from coming to this conclusion by the omission of specific words of inheritance. (3) So also a lease has been created by a covenant with a man that he should enjoy the land for a certain time (4) and by a mere license to occupy for a certain time. (5)

Where diverse persons join in a deed and some are able to make such deed and some are not able, this shall

(1) *Smith d. Dorner v. Packhurst* (1742), 3 Atk., 135, 136; *sub nom Packhurst v. Smith*, Willes, 327.

(2) *Shep. Touch.*, 82. *Goodtitle v. Bailey* (1777), 2 Cbwp., 600; *Chester v. Willan* (1669), 2 Wms. Saund. 96 a (n).

(3) *Churaman v. Balli* (1887), 9 All.,

591.

(4) *Tisdale v. Essen* (1615), Hob. 34; *Drake v. Munday* (1630), Cro. Car. 207; W. Jo. 231.

(5) *Hale v. Seabright* (1669), 1 Mod. 14; *Norton*, pp. 51, 52.

be said to be his deed alone that is able ; and if a deed be made to one that is incapable and another that is capable, it shall enure only to the latter. So if a mortgagor and mortgagee join in a lease, this enures as a lease to the mortgagee, and the confirmation by the mortgagor. And if there be a joint lease by tenant for life and remainderman, such lease operates during the life of the tenant as his demise, confirmed by the remainderman, and afterwards as the demise of such last-mentioned party. (1)

Where by mistake a part only of the premises intended to be mortgaged was described in the deed, and would alone pass under a bill of sale in execution to the auction-purchaser, it was held that the Court ought to interfere for the rectification of the instrument, and that, regard being had to the intention and subsequent dealings of the agreeing parties, it ought to be construed as if it had expressly and fully mortgaged and conveyed the entire premises in question. (2)

Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void ; but where you can sever them, whether the illegality be created by Statute or by common law, you may reject the bad part and retain the good. (3)

Where there is a gift to a class some of whom are or may be incapacitated from taking, because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking

(1) *Broom*, 502.

(2) *Sreemutty Puddo Monjee Dasi v. Dwarika Nath Biswas* (1876), 25 W. R., 335.

(3) *Per Willes, J., Pickering v.*

Ilfracombe Ry. Co. (1868), L. R., 3 C. P., 250 ; 37 L. J. C. P., 118 : *In re Burdet* (1888), 20 Q. B. D., 314 ; 57 L. J. Q. B., 118 ; *Mackenzie v. Stramiah* (1890), 13 Mad., 472 ; Contract Act, s. 27.

where the intention is...to give a present gift to those of the class who are capable of taking. (1) Formerly it was held that where there was a gift to a class some of whom were incapable of taking the whole gift, was void for remoteness, (2) but it is submitted that this ruling has been greatly modified by the decision of the Privy Council in *Asmaida Koer's* case, (3) which, to use the words of Garth, C. J., (4) may be the means of introducing a very material and salutary change of the law in cases of this kind.

Rule 12. When the operative part of a deed is clear, it cannot be controlled by the recitals or other parts of the deed.

A specific description of property, or a specific description of what is intended to be done contained in the operative clauses, will not be controlled by a general description, or a general or ambiguous statement, contained in the recitals. (5) The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. Mis-recitals of another document in a deed does not destroy the effect of a deed when the meaning and intention is most manifest and clear how the estate shall go. (6) It is of the greatest consequence to keep distinct the different parts of deeds, and to give recitals and to the operative part their proper effects. I have always held that where the recitals and the operative part of a deed are at variance, the operative part must be

(1) *Sett v. Sett* (1886), 12 Cal., 685.

(2) *Soudamini Dasi v. Jogesh Ch. Dutt* (1876), 2 Cal., 262; *Kherodesmoney v. Doorgamoney* (1878), 4 Cal., 455.

(3) (1884) 11 I. A., 164; 6 All., 560.

(4) 12 Cal., 686.

(5) *Norton*, p. 182; *Walsh v. Trevanion* (1850), 15 Q. B., 751; 19 L. J. G., 462; 14 Jur., 1196.

(6) *Bath & Montague's case* (1693), 3 Ca. Ch., 101.

officious and the recitals inofficious. I do not say in-operative, for the recitals may be useful in explaining ambiguities. (1) So that if both the recitals and the operative part are clear but they are inconsistent with each other, the operative part prevails, for it is impossible by a recital to cut down the plain effect of the operative part of a deed. (2)

So where a bond was taken in the penalty of £1,000 it was held that the penalty could not be cut down to £500 by a recital that the parties had agreed to execute a bond for that amount. (3) A recital in a transfer of a mortgage that the mortgage contained a power of sale, which had not been and was not intended to be exercised, followed by an assignment of the moneys due on the mortgage and all powers and remedies for recovering such moneys and all benefit under the mortgage transferred was held not to operate so as to prevent the exercise of the power of sale. (4)

Rule 13. When the operative part of a deed is ambiguous or goes beyond the recitals, it may be controlled by the recitals and other parts of the deed.

Thus general words in the operative part of a deed may be controlled by the recitals or other parts of the deed. The chief instances of this rule are releases. If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law in order to prevent surprise will construe it to relate to the particular matter recited, which was under the contemplation of the parties, and

(1) *Per Romilly, M. R., Young v. Smith* (1865), 1 Eq. 183; 20 Beav., 90.

(2) *Per Romilly, M. R., Holliday v. Overton* (1852), 14 Beav., 470.

(3) *Ingleby v. Sigist* (1833), 10 Bing., 84; Norton, p. 182.

(4) Norton, p. 192. *Boyd v. Petrie* (1872), 7 Ch., 385.

intended to be released. (1) You cannot control clear words of conveyance by words of recital. That is one canon undoubtedly. But the expression "clear words of conveyance" is subject to interpretation. For instance the doctrine is as applicable to vases as to any thing else and the exception will be found to be always, that general words are not within that description of clear words of conveyance which cannot be controlled by recital. . . . In releases, for instance, upon which this question occurs much more frequently than in conveyances, where there are general words amply sufficient to cover anything, it has long been settled that the recitals clearly restrict the effect of the lease. (2) If you find in a settlement recitals indicating various parcels enumerated, from whence it is to be inferred, from reading the recital alone, that these parcels, and these parcels alone, are to be included in and made subject to the provisions of the deed, but yet you find that in the operative part of the deed one or two of these parcels are omitted, the Court may be of opinion, upon the construction of the deed, that the parcels, which are omitted in the operative part of the deed, are omitted by mistake, and are not included in the provisions of the deed. And the converse of that proposition is also true ; parcels may be included in the operative part of the deed which the recitals and the rest of the deed show to have been inserted there by mistake. (3) The recitals are the key to what is intended to be done by the deed, and though general words may be put in to guard against an accidental omission, yet in the absence of any indication of a larger meaning, the deed must be

(1) *Ramsden v. Hilton* (1751), 2 Ves. Sen., 310 ; Norton, p. 192.

(2) *Rooke v. Lord Kensington* (1856), 2 K. & J., 769 ; 25 L. J. Ch., 795.

(3) *Barratt v. Wyatt* (1862), 30 Beav., 443 ; *Moore v. Magrath* (1774), 1 Cowp., 9.

held to refer to estates or things of the same nature or description with those which have been already mentioned.(1) A recital may explain an ambiguity in the operative part, but it cannot have the effect of introducing a covenant in it. (2)

Rule. 14. A mis-recital will not vitiate the deed if it be sufficiently clear what is intended. (3)

If on the grant of a reversionary lease, an existing lease to *A* is recited, and the date is incorrectly stated and the words "from and after the lease to *A*" appear in the habendum, the reversionary lease commences on the expiration of the lease to *A*. (4)

But a mis-recital may influence the construction. Thus, although the conveyance of a manor *prima facie* draws after it an advowson appendant thereto, where a deed began by reciting that the testator was seised of the manor, *and also of the advowson*, and then went on to recite the *devise* of the manor *not including the advowson*, and then recited that *A* being seised in fee of a *moiety of the advowson*, devised it, it was held that there was a conveyance of the manor and a *moiety of the advowson*. "It being a mere question of intention, in what sense the parties intended to use the word "manor," whether as including or excluding the advowson, we think it clear, from the passages pointed out, that they must have meant to exclude it, and consequently the deed must be read as if it was so stated on the face of it; and the consequence is, that the advowson did not pass merely by the force of the word "manor."(5) An erroneous recital of a grantor's

(1) *Crompton v. Jarrett* (1885), 30 Ch. Div., 307.

(2) *Young v. Smith* (1865), 35 Beav., 90; 1 Eq., 180.

(3) *Norton*, p. 193.

(4) *Co. Litt.*, 46 B.

(5) *Moseley v. Motteux* (1842), 10 M. & W., 533, at p. 545.

earlier title does not preclude his grantee from showing what interest really passed by his grant.(1)

A mis-recital may also operate by way of estoppel, thus, in *Bowman v. Taylor*(2) the deed recited that the plaintiff had invented certain improvements and obtained a patent for the invention ; and the defendant, in consideration of a license to use it, entered into covenants, for the breach of which he was sued ; it was held that he could not traverse the plaintiff's invention, and that a plea to that effect was bad. The passage in Co. Litt. 352b was cited. "Neither doth a recital conclude because it is no direct affirmation." But the Court were unanimous in giving effect to the estoppel. "The law of estoppel," said Taunton, J.(3), "is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether there is a matter so asserted by the defendant under his hand and seal that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive, because it is introduced by a "whereas.""(4)

But in order to operate as an estoppel a recital must be precise and unambiguous ;(5) it must not be general in its terms for it is a rule that an estoppel should be certain to every intent, and, therefore, if the

(1) *Trinidad Asphalt Co. v. Conjal* [1898], A. C., 587, 593.

(2) (1834), 2 A. & E., 278.

(3) *Ib.*, p. 291.

(4) 2 Sm. L. C., 11th Ed., 824. See *Lavison v. Tremore* (1834), 1 A. &

E., 792.

(5) *Per Lord Cairns, L. C., Heath v. Crealock* (1874), L. R., 10 C. A., 22, at p. 30 ; see *Lovett v. Lovett* (1898), 1 Ch., 82 ; *In re Maddy's Estate* (1901), 2 Ch., 820.

thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel.(1) It may be that, when a deed contains a recital of a particular fact in express terms, the effect of the recital cannot be got rid of by shewing what the intention of the parties was. But when the language is general, we may collect the intention from the terms of the whole deed.(2) But if a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital.(3)

When a recital is intended to be a statement which all parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument.(4) A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part.(5)

Rule 15. The express mention of one thing implies the exclusion of another.(6)

The above rule, or, as it is otherwise worded, *expressum facit cessare tacitum*(7), enunciates one of

(1) *Per Tenterden, C. J., Right v. Bucknell* (1831), 2 B. & A., 281.

(2) *Per Channell, B., South Eastern Ry. Co. v. Warton* (1861), 6 H. & N., 528.

(3) *Per Parke, B., Carpenter v. Buller* (1841), 8 M. & W., 212.

(4) *Per Patison, J., Stronghill v. Buck* (1850), 14 A. & E., 787; *Young v. Rain-*

cock (1849), 7 C. B., 310.

(5) *Brooke v. Haymes* (1868), L. R., 6 Eq., 25; *Empson's case* (1870), L. R., 6 Eq., 597.

(6) *Broom's Leg. Max.*, 6th Ed., p. 606. *Expressio unius est exclusio alterius*, Co. Litt., 210 (a).

(7) Co. Litt., 183 (b.)

the first principles applicable to the construction of written instruments; for instance, it seems plainly to exclude any increase of an estate by implication, where there is an estate expressly limited by will. So an implied covenant is to be controlled within the limits of an express covenant. Where a lease contains an express covenant on the part of the tenant to repair, there can be no implied covenant to repair arising from the relation of landlord and tenant.(1) Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.(2) So where the plaintiff sold to the defendant a field containing a well upon both of which a tax was payable, but the deed of sale while expressly providing for the payment of the tax on the field by the defendant was silent as to the payment of the tax on the well, it was held that the plaintiff could not recover the tax on the well from the defendant.(3)

Great caution is necessary in dealing with the maxim *expressio unius est exclusio alterius*, for as Lord Campbell, L. C., observed in *Saunders v. Evans*(4) it is not of universal application, but depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction; thus, where *general words* are used in a written instrument, it is necessary, in the first instance, to determine whether those general words are intended to include other matters, besides such as are specifically mentioned, or to

(1) *Broom's Leg. Max.*, pp. 606, 607; *Slinden v. Chrimas* (1847), 10 Q. B., 135, 141.

Austin (1844), 5 A & E., 684. (3) *Gulabhai v. Dayabhai* (1873), 10 Bom. H. C., 51.

(2) *Per Denman, C. J.*, *Aspin v.*

(4) (1861), 8 H. L. Cas., 720.

be referable exclusively to them, in which latter case only can the maxim be properly applied. Where, moreover, an expression, which is *prima facie* a word of qualification, is introduced, the true sense and meaning of the word can only be ascertained by an examination of the entire instrument, reference being had to those ordinary rules of construction to which we have heretofore adverted.(1)

Rule 16. **An alteration in a material point avoids a deed unless the alteration is made with the privity of the obligor and obligee.(2)**

An alteration which, if made before execution, would have affected the position, rights, or obligations of any person claiming under the deed, is material.(3) And if an alteration be made in a deed, even with the consent of all parties, so as to express an intention which was not the intention of the parties at the time of the execution thereof, no party can enforce any obligation contained in the deed as it originally stood, because such obligations are vacated.(4)

In the absence of evidence to the contrary, alterations, interlineations, and erasures appearing on the face of deeds will be presumed to have been made before execution.(5) And this is consistent with good sense: for every deed expresses the mind of the parties at the time of execution; and so, to alter it afterwards, would be fraudulent, and, in many cases, highly criminal.(6) But if a material alteration by erasure, interlineation, or otherwise, be made, after execution, in a deed by, or with the consent of, any party thereto, he cannot as

(1) Broom Leg. Max., 669.

(2) Beal, p. 90.

(3) Norton, p. 38.

(4) *Ib.*, p. 34.

(5) Phipson, 4th Ed., p. 491.

(6) *Per Lord Cranworth, V. C., Simmons v. Rudall* (1851), 1 Sim. N. S., 136; see *Williams v. Ashton* (1860), 1 J. & H., 118.

plaintiff enforce any obligation contained in it against any party who did not consent to such alteration.(1) If, however, an alteration is made with the consent of all parties, for the purpose of carrying out the intention of the parties at the time of the execution of the deed, such alteration does not prevent the person making it from enforcing the deed.(2)

Material alterations made by a stranger, i.e., a person not a party to, or claiming under a party to, the deed, do not prevent any person from enforcing the deed, except a person in whose custody the deed was when the alteration was made.(3) An immaterial alteration made in a deed after execution, by whomsoever made, does not affect the deed, or the rights of any person thereunder. An alteration which only expresses something which would have been implied in the deed before the alteration was made is immaterial.(4) Thus, where a promissory note expressed no time for payment, and while it was in the possession of the payee, the words "on demand" were added without the assent of the maker, it was held in an action by the payee against the maker that, as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument.(5)

Rule 17. Matters referred to are regarded as actually inserted in a deed.(6)

The rule is, that by referring in a document signed by the party to another document, the person so signing

(1) *Norton*, p. 31; *Ganga Ram v. Chandan Singh* (1881), 4 All., 62; *Gogun Chunder Ghose v. Dharonidhur Mandal* (1881), 7 Cal., 613; *Christa Charlu v. Karibasayya* (1885), 9 Mad., 399; but see *Mangal Sen v. Shankar Sahai* (1903), 25 All., 580.

(2) *Norton*, p. 33.
(3) *Ib.*, p. 37.
(4) *Ib.*, p. 39.
(5) *Aldous v. Cornwell* (1868), I. R., 3 Q. B., 573; 9 B. & S., 607.
(6) *Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur.*

in effect signs a document containing the terms of the one referred to.(1) It is important to bear in mind, when reading any particular portion of a deed or written instrument, that regard must be paid not only to the language of the clause in question, but to that also of any other clause or covenant which may by reference be incorporated with it.(2) Where, by articles under seal, the defendant bound himself under a penalty to deliver to the plaintiff by a certain day "the whole of his mechanical pieces as per schedule annexed;" the schedule was held to form part of the deed, for the deed without it would be insensible and inoperative.(3) And if a contract of sale refer to an inventory, the entire contents thereof will become incorporated with the contract.(4) In like manner, if a contract or an act of Parliament refer to a plan, to the extent that the act refers to the plan, and for the purpose for which the act or contract refers to the plan, undoubtedly it is part of the contract or part of the act.(5) And a deed of conveyance, made under the authority of an Act of Parliament, and in the form prescribed thereby, must be read as if the sections of the Act applicable to the subject-matter of the grant and its incidents were inserted into it.(6)

A deed recited a contract for the sale of certain lands, by a description corresponding with that subsequently contained in the deed, and then proceeded to

Co. Litt., 159(a). Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.

(1) *Per Crompton, J., Fitzmaurice v. Bayley* (1860), 9 H. L. C., 99.

(2) *Broom's Leg. Max.*, 16th Ed., p. 628.

(3) *Weeks v. Maillandet* (1811), 14

East, 568.

(4) *Taylor v. Bullen* (1850), 5 Ex., 779. See *Wood v. Rowcliffe* (1851), 6 Ex., 407.

(5) *Per Lord Cottenham, L. C., North British Ry. Co. v. Tod* (1846), 12 Cl. & Fin., 731.

(6) *Broom's Leg. Max.*, p. 629; *Elliot v. North Eastern Ry. Co.* (1863), 10 H. L. C., 333.

convey them, with a reference for that description to three schedules. The portion of the particular schedule relating to the piece of land in question stated, in one column, the number which this piece was marked on a certain plan, and in another column, under the heading "description of premises," it was stated to be "a small piece, marked on the plan;" and by applying the maxim, *verba relata misse videntur*, the Court of Exchequer considered, on the above state of facts, that it was the same thing as if the map or plan referred to in the schedule had been actually inserted in the deed, since it was, by operation of the above principle, incorporated with it.(1)

(1) Broom's Leg. Max., pp. 629, 630; M. & W., 183.
Iterellyn v. Earl of Jersey (1843), 11

LECTURE V.

A COVENANT is a clause of agreement contained in a deed (whether by recital, provision, or exception), whereby either party stipulates for the truth of certain facts, or binds himself to perform, or forbear doing, something or other.(1) The word "covenant" seems to be borrowed from the Latin *convenire* or *conventus*, which signifies a mutual agreement and accord, upon conditions propounded and accepted by the parties concerned. A covenant then is a mutual consent and agreement entered into between persons, whereby they stand bound each to the other to perform the conditions contracted and indented for.(2) Covenants are distinguished into express and implied covenants—express, when they are expressed in a deed ; implied, when the deed doth not express them, but the law doth make and supply them. Covenants again are distinguished into affirmative and negative, as they may be in the one or the other ; and into covenants executed and executory : the former referring to a thing as done already ; the latter providing that it shall be done hereafter.

A covenant is not a duty, nor a cause of action, till it be broken ; so that it is not discharged by a release of all actions : and when it is broken, the action is not founded merely on the speciality, as if it were a duty, but savours of trespass, and sounds in damages, and therefore an accord is a good plea to it.(3)

(1) Beal, p. 76.

(2) Bac. Abr. "Covenant," p. 336.

(3) *Ib.*, p. 337.

Rule 18. No particular form of words is necessary to create a covenant. (1)

There need not, in this case, be formal and orderly words as "covenant," "promise," and the like, to make a covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for any thing to be or not to be done, the party to or with whom the promise or agreement is made, may have this action upon the breach of the agreement.(2) But the Court must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done.(3) An agreement between *A* and *B* that *A* shall pay a certain sum of money to *B* for his lands, such money to be paid at a certain fixed time is construed as a covenant on the part of *B* to convey the lands. (4) A declaration of trust is equivalent to a covenant, (5) and a recital in a deed may operate as a covenant, where it appears to have been the intention of the parties that it should so operate.(6) Thus a recital in a creditor's deed that the debtor had agreed to pay a certain compensation on his debts followed by a release by the creditors was held to amount to a covenant to pay the composition. (7) A recital in a separation deed that the husband and wife had agreed to live apart was construed as an implied covenant on the part of the wife to live apart.(8) A

(1) *Norton*, p. 484. *Mackenzie v. Chidders* (1890), 43 Ch. D., 275.

(2) *Shep. Touch*, p. 162.

(3) *James v. Cochrane* (1852), 7 Ex., 177; *per Parke*, B.

(4) *Pordage v. Cole* (1670), 1 Wms. Saund. 3196 (ed., 1871), Vol. 1, p. 548.

(5) *Norton*, p. 488.

(6) *Ib*, p. 198; *Lay v. Mottram* (1865), 19 C. B. N. S., 479; *Mackenzie v. Chidders* (1889), 43 Ch. D., 265; *Buckland v. Buckland* (1900), 2 Ch., 534.

(7) *Norton*, p. 490; *Lay v. Mottram, ubi supra*.

(8) *Re Weston Dairies v. Tagart* (1900), 2 Ch., 164.

mere admission of a debt by a recital, where the recital has no other object, implies a covenant for payment.(1)

Rule 19. Where a deed contains express covenants, no implication of any other covenants on the same subject-matter can be raised.(2)

If there is an express covenant in the deed to which a recital can be referred, the express covenant supersedes the covenant which might in its absence have been implied from the recital.(3) Where, in a conveyance, express covenants for warranty are introduced, none can be implied from the general words of conveyance; and the Court has no other duty to discharge than that of correctly construing the language employed.(4) No implied contract to repair arises out of the relation of landlord and tenant, where a tenant holds under an express contract which provides for the very matter.(5)

Rule 20. The words of a covenant are to be taken most strongly against the covenantor, due regard being paid to the intention of the parties as collected from the whole content of the deed.(6)

Ambiguous words shall be taken most strongly against the grantor and in favour of the grantee. *Verba fortius accipiuntur contra preferentem.* For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest, by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided, for men would always

(1) *Norton*, p. 491. As regards covenants implied by the law, see ss. 55, 60, 106, and 108, of the Transfer of Property Act (IV of 1882), and s. 9 of the Contract Act (IX of 1872). See the *Moorcock* (1889), 14 P. D., 64; 58 L. J., p. 73.

(2) *Norton*, p. 500.

(3) *Young v. Smith* (1865), L. R., 1 Eq., 180; 35 Beav., 87.

(4) *Per Denman, C. J., Stannard v. Forbes* (1837), 6 A. & E., 587.

(5) *Standen v. Christmas* (1847), 10 Q. B., 141.

(6) *Beal on Interpretation*, p. 79.

affect ambiguous and intricate expressions, if they were afterwards at liberty to put their own construction upon them. But, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail ; and it does not apply to a grant by the Crown at the suit of the grantee.(1) Where a grantor by deed conveyed all his claims under a will to the grantee he was not allowed to contend afterwards that the deed only covered claims then existing under the will and did not extend to future claims.(2) Covenants for title bind only the covenantor and his representatives, and not aliens as such.(3) The word "acts" means something done by the person against whose acts the covenant is made ; and the word "means" has a similar meaning, *viz.*, something proceeding from the person covenanting, or the person against whose acts, &c., the covenant is made.(4) The fact of a purchaser having notice of a defect, whether it appears on the face of the deed or not, does not prevent the covenants for title from extending to it ; if it is intended that such a defect shall not be covered by the covenants, care must be taken that the covenants are not so worded as in terms to cover the defect, or some clause must be inserted in the deed clearly explaining and controlling the covenants ; where, however, the purchaser consents to take a defective title in reliance on the covenant for

(1) 1 Steph. Com., 8th Ed., 499 ; see 14th Ed., 298 ; *Browning v. Wright* (1799), 2 B. & P., 22 ; *Barton v. Fitzgerald* (1812), 15 East., 545 ; *Webb v. Plummer* (1819), 2 B. & Ald., 751 ; *Hind v. Marshall* (1819), 1 B. & B., 335 ; *Warde v. Warde* (1852), 16 Beav., 105 : but see *Taylor v. Corporation of St. Helens* (1877), 2 Ch. Div., 270.

(2) *Greunder Chunder Ghose v. Troylucky Nath Ghose* (1892), 20 Cal., 373.

(3) Dart's Vendors and Purchasers, 7th Ed., Vol. II, 785.

(4) *Ib.*, 792 : see *Fowle v. Walsh* (1822), 1 B. & C., 29 ; *Nash v. Palmer* (1816), 5 M. & S., 374

title, as a matter of prudence and precaution it is usual to make the matter plain by inserting words to show that even defects known to the purchaser are intended to be covered. If, however, the defect does not appear on the deed, and it is generally desirable that it should not, either the covenant should be entered into by a separate instrument, or, and it is conceived that this would be sufficient, a memorandum should be signed by the covenantor admitting the defect is known, and that it is intended to be provided for by the covenants: for as the covenantor, seeking to escape the general terms of the covenant, must then, by evidence, outside the deed, show that the covenantee had notice of the defect, so the covenantee might, in like manner, show that the defect, though known, was not intended to be excepted.(1) It is a settled rule of construction that, where there is a grant and an exception out of it, the exception is to be taken as inserted for the benefit of the grantor, and to be construed in favour of the grantee: see Sheppard's Touchstone, 7th Ed., p. 100; *Earl of Cardigan v. Armitage* (2); *Bullen v. Denning* (3). If, then, the grant be clear, but the exception be so framed as to be bad for uncertainty, it appears to us that, on this principle, the grant is operative and the exception fails.(4)

Exception.—The king's grant is taken most strongly against the grantee, and most favourably for the king, although the thing which he grants came to the king by purchase or descent. (5)

(1) Dart's Vendors and Purchasers, 7th Ed., Vol. II, 794, 795.

(2) (1823), 2 B. & C., 197; 3 D. & R., 414; 26 R. R., 313.

(3) (1826), 5 B. & C., 842, 850; 8 D. & R., 657; 29 R. R., 431.

(4) *Per Stirling, L. J., Savill v. Bethell* (1902), 2 Ch., 537, 538.

(5) *Per Weston, J., Willion v. Berkley* (1562), Plowd. 223, at p. 243; Norton, p. 122; and see cases cited there.

Rule 21. A covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction.

I think the correct rule is laid down by Gibbs, C. J., in *James v. Emery* [(1818), 8 Taunt, 245], with the qualification stated by Mr. Preston in the note in Sheppard's Touchstone, p. 166. That rule is, that a covenant will be construed to be joint or several according to the interests of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint. Suppose there were a covenant with *A* and *B* *jointly*, that a certain thing should be done by the covenantor; both of these persons must sue. But where it appears upon the face of the deed that *A* and *B* have several interests, they must sue separately; for though the words be *prima facie* joint, they will be construed to be several, if the interest of either party appearing upon the face of the deed shall require that construction.(1) Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant and *vice versa*. But there is no rule to say that words which are expressly a joint covenant by several persons shall be construed as a several covenant, unless there is something to lead to that construction. Where there are several parties, if the interest is joint, the covenant is construed as a joint

(1) *Per Parke, B., Sorsbie v. Park* p. 11; *Palmer v. Mallett* (1887, 36 Ch. 1843), 12 M. & W., 158; 13 L. J. Ex., D., 421; 57 L. J. Ch., 228.

covenant. If a party covenants with *A* and *B* to do something for *B*, and the words themselves are otherwise free from ambiguity, it must be a joint covenant.(1)

Thus a covenant with two or more, or with two or more and each and every of them, where one of them has no beneficial interest in the subject-matter of the covenant, will be construed as a covenant with them jointly, and the benefit of it will survive.(2) The reason given is that where the interest in the performance of the covenant is joint, if several were to bring actions for one and the same cause, the Court would be in doubt for which of them to give judgment for.(3) A covenant to and with *A*, his executors, administrators and assigns, and to and with *B* and her assigns, to pay an annuity to *A*, his executors, etc., during *B*'s life, is a joint covenant to *A* and *B*, in which they have a joint legal interest, although the benefit be for *A* only ; and therefore on the death of *A* the right of action survives to *B*, and *A*'s administrator cannot sue on the covenant.(4) The covenant to both is for the same thing ; and though the benefit may be to only one of them, yet both have a legal interest in the performance of it ; and therefore, the legal interest being joint during the lives of both, on the death of one it survives to the other.(5)

Rule 22. The question whether a sum named to be paid on non-performance of a covenant is a penalty or liquidated damages, depends on the construction of the whole deed.(6)

The question whether a sum is a penalty or liquidated damages is one of construction. That is the

(1) *Per* Lord Abinger, C. B., *Sorsbie v. Park*, ubi supra.

(2) *Norton*, p. 520.

(3) *Anderson v. Martindale* (1801), 1 East, 500; *per* Lord Kenyon, C. J.

(4) *Anderson v. Martindale*, *Ib.*, p. 497.

(5) See Lord Kenyon's judgment, p. 500.

(6) *Norton*, p. 505.

primary rule. Certain subordinate rules have also been laid down with regard to the mode in which the Court is to construe agreements of this description. In the first place it is quite plain that the words "liquidated damages" describing the nature of the payment are by no means conclusive. It was thought in *Reilly v. Jones*(1) that they were conclusive, but *Kemble v. Farren*(2) has shown us that they are not. In *Green v. Price*(3), the Court of Exchequer seems to have thought that the *onus* of proof was upon those who asserted that a sum described as "liquidated damages" was a penalty. In every case the Court seems to have thought that the words had little or no operation.(4) When one lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification; but where the payments stipulated are made proportionate to the extent to which the contractors may fail to implement their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages.(5) It is the law that where payment is conditioned on one event the payment is in the nature of liquidated damages; but where it is conditioned on more than one event it is in the nature of a penalty.(6)

(1) (1823) 1 Bing., 302.

(2) (1829) 6 Bing., 141; 31 R. R., 366; where a sum expressly declared by the parties to be "liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof," was held to be a penalty.

(3) (1845) 13 M. & W., 695.

(4) *Per Fry, J., Wallis v. Smith* (1882),

21 Ch. D., 249, 250.

(5) *Lord Elphinstone v. The Monkland Iron and Coal Co.* (1886), 11 App. Cas., 332.

(6) *Per A. L. Smith, L. J., Stricklands v. Williams* (1899), 1 Q. B., 384, 385. See *Behari Lall Doss v. Tej Narain* (1884), 10 Cal., 764; Contract Act, s. 74.

Rule 23. Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent contract.(1)

In contracts containing executory considerations or mutual promises, the obligation of the one promise may be quite independent of the performance of the other. But it may appear upon the construction of the mutual promises, or from the connection of their matter, that the obligation of the one promise is expressly or impliedly conditional upon the due performance of the other; in which case the promises are not only mutual but also dependent.(2) “There are three kinds of covenants: (a) Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff; (b) There are covenants which are conditions and dependent, in which the performance of the one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant; (c) There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act. His Lordship

(1) Beal, p. 82.

pp. 456, 457.

(2) Leake on Contracts, 5th Ed.,

then proceeded to say, that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however, transposed, they might be in the deed, their precedency must depend upon the order of time in which the intent of the transaction required their performance.”(1) “The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention, has been laid down with great accuracy by Lord Ellenborough, in the case of *Richie v. Atkinson*(2) to be this, ‘that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.’(3) There are no precise technical words required in a deed to make stipulation a condition *precedent* or *subsequent*; neither doth it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates a proviso or a covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction.”(4)

(1) *Per Mansfield, C. J., Kingston v. Preston* (1773); cited in *Jones v. Barkley* (1781), 2 Doug., 689, 690.

(2) (1808), 10 East, 295.

(3) *Per Tindal, C. J., Stavers v. Curling* (1836), 3. Bing. N. C., 368.

(4) *Per Ashurst, J., Hotham v. East India Co.* (1787), 1 T. R., 645.

As regards restrictive covenants the following rules appear to govern their construction. Where any sentence contains distinct covenants, and there are words of restriction either in the prefatory or concluding part, these words must be extended to every part of the sentence, unless the intention of the parties appears to require a contrary construction.(1) Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct. But where the covenants are of divers natures and concern different things restrictive words added to one shall not control the generality of the others. Thus, a prior general covenant will not be restrained by a subsequent limited covenant having a different object, yet where the two covenants relate to the same object restrictive words in the second may, it seems, control the generality of the first. And, of course, restrictive words occurring in one covenant may extend to another if the grammatical connection of the two require, and no inconsistency would result from, such a construction,(2) moreover in adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the Court will, in a proper case, enforce the negative portion of the covenant.(3)

Agreements in restraint of trade are governed by section 27 of the Contract Act. This section does away with the distinction observed in the English cases following upon *Mitchel v. Reynolds*(4) between partial

(1) *Per Heath, J., Browning v. Wright* (1799), 2 Bos. & P., 27.

(2) *Dart's V. & P.*, 798, 799.

(3) *Clegg v. Hands* (1890), 44 Ch. D., 503; 59 L. J. Ch., 477.

(4) (1711), 1 Sm. L. C., 11th Ed., 476.

and total restraint of trade, and makes all contracts falling within the terms of the section void, unless they fall within the exceptions.(1) In the case of covenants in restraint of trade the deed of covenant must show a good consideration, but the Courts will not enter into the question of the adequacy of the consideration.(2) An agreement binding the defendants to remain subject to the orders of the plaintiff, the head of their caste, and not to carry on their trade with the assistance of any other persons than their own caste and imposing penalties for non-performance was not given effect to on the ground that such an agreement was contrary to public policy.(3) But a stipulation in a contract prohibiting any sales of goods to others during a particular period, of a similar description to those bought under the contract is not a stipulation in restraint of trade within the purview of section 27.(4)

Rule 24. When two clauses in a deed after applying all permissible rules of construction remain inconsistent and repugnant to each other, the former prevails.

Thus, if there is a personal covenant followed by a proviso that the covenantor is not to be liable under the contract, the proviso is inconsistent and repugnant to the covenant, and by no rules of construction can they be made consistent.(5)

This rule is laid down in numerous old cases and text-books, but it may be doubted whether there is much authority for the rule, and it probably rests on the

(1) *Per Handley, J., Mackenzie v. Stiramiah* (1890), 13 Mad., 473; cited *Nur Ali v. Abdul Ali* (1892), 19 Cal., 773. See *Madhub Chunder v. Rajcoomar* (1874), 14 B. L. R., 76; *Oakes v. Jackson* (1876), 1 Mad., 134; *The Brahmaputra Tea Co. v. Scarth* (1885), 11 Cal., 545.
 (2) *Auchterlonie v. Bill* (1868), 4 M.

H. C., 77.

(3) *Vaithelinga v. Samnada* (1878), 2 Mad., 44.

(4) *Carlisle v. Ricknauth* (1882), 8 Cal., 809.

(5) *Furnivall v. Coombes* (1843), 5 M. & G., 736; 12 L. J. C. P., 265.

proposition that if a grant has been made to *A*, there is nothing left in the grantor to grant to *B*, so that the grant to *A* is effective, while that to *B* is not. At any rate, the rule is one which is only applied in the last resort, if a Judge can find nothing else to assist him in determining the question. (1)

It must always be borne in mind that every deed depends for its interpretation upon the particular state of facts belonging to or connected with it. But it is hoped that the principles, which, after due allowance has been made for each particular state of facts, are generally applicable to the construction of deeds in general have been correctly set out in the rules given above. As regards mercantile documents this also must be remembered. Where documents are in daily use in mercantile affairs, without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago, and which has from that time been accepted in the Courts of law, and in the mercantile world, should not be in the least altered, because all subsequent contracts have been made on the faith of the decisions. Therefore, whether one thinks that one would oneself have come to the same conclusion as the Judges did in the beginning is immaterial. One ought to adhere strictly to the construction which has been put upon such documents.

Moreover, if these documents, construed as the Judges have construed them for many years, have also for many years been applied in a particular way to facts similar to those which are in question at this day in a cause, it is equally material to adhere to that application, or else mercantile business becomes wholly uncertain. (2)

(1) *Norton*, p. 80.

(2) *Per Esher, M. R., Pandorf v.*

Hamilton (1886), 17 Q. B., D., 670, at p. 674; 55 L. J. Q. B., 546, at p. 548.

LECTURE VI.

(a) A will is the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death.(1)

(b) A codicil is an instrument made in relation to a will, and explaining, altering, or adding to its dispositions. It is considered as forming an additional part of the will.(2)

(a) A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is *in its own nature* ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills ; for, though a disposition by deed may postpone the possession or enjoyment or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of *A* in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by will, make an immediate devise of such lands to *A* in fee ; and yet the case fully illustrates the distinction in question ; for, in the former instance, *A*, *immediately* on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever

(1) Succession Act (X of 1865), s. 3, 1881), s. 3.
Probate and Administration Act (V of 1881), s. 3.

(2) *Ib.*

until the decease of the testator shall have called the instrument into operation.(1)

(b) Where a testator purports to make two bequests to the same person the word 'will' does not include a 'codicil'.(2)

Where a will has been revoked but there remains after the death of the testator a duly executed codicil thereto the codicil is entitled to be admitted to probate although the will has been revoked.(3)

Rule 1. To the Court of the domicile belongs the interpretation and construction of the will of the testator.

I hold it to be now put, beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To the Court of the domicile belongs the interpretation and construction of the will of the testator. To determine who are the next-of-kin or heirs of the personal estate of the testator, is the prerogative of the judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the will of the testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort.(4)

Succession to the immovable property in British India of a person deceased is regulated by the law of

(1) *Jarman on Wills*, 5th Ed., p. 18.

(2) *Succession Act*, s. 88.

(3) *Black v. Jobling* (1869), L. R., 1 P. & D., 685. *In the goods of Turner* (1872), L. R., 2 P. & D., 403.

(4) *Per Lord Westbury*, L. C., *Evo.*

hin v. Wylie (1862), 10 H. L. C., 1, at p. 13, but in that case the executors agreed to the jurisdiction of a Court other than the Court of domicile; *Doglioni v. Crispin* (1866), L. R., 1 H. L., 301.

British India, wherever he may have had his domicile at the time of his death. Succession to the movable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.(1)

A bequest to the children of a foreigner whether of movable(2) or immovable property(3) means to his legitimate children and by international law those children are legitimate whose legitimacy is established by the law of the father's domicile.(4)

Rule 2. No technical forms are necessary to convey the intention of the testator.(5)

The law has not made requisite, to the validity of a will, that it should assume any particular form, or be couched in language appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.(6) The reason of this is because a testator is presumed by law to be *inops consilii*.⁽⁷⁾

Rule 3. The object of the interpretation of a will is to give effect to every part if possible.

There is one rule of construction which to my mind is a golden rule, *viz.*, that when a testator has

(1) Succession Act, s. 5.

(2) *In re Andros* (1883), 24 Ch. Div., 637.

(3) *In re Grey's Trusts* (1892), 3 Ch., 88.

(4) As regards domicile see ss. 6-19 of the Succession Act.

(5) Succession Act, s. 61.

(6) Jarman on Wills, 5th Ed., p. 19, cited with approval as correctly stating the law on the subject by Lord Sel-

borne, L. C., in *White v. Pollock* (1882), 7 App. Cas., 400 at p. 409. Of course the wills of all persons governed by the Succession Act, the Hindu Wills Act (XXI of 1870), and the Oudh Estates Act (I of 1869) must conform to the provisions laid down by s. 50 of the Succession Act.

(7) *Surtees v. Ellison* (1829), 9 B. & C., 752.

executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy.(1) Where there is a reasonable construction which results in a testacy, that construction must prevail rather than one which leads to an intestacy.(2)

Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred.(3) When, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even if the construction adopted is not grammatically accurate.(4)

No part of a will is to be rejected as destitute of meaning, if it is possible to put a reasonable construction on it.(5)

But by "effect" is meant legal effect. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be effected by

(1) *Per Esher, M. R., In re Har-
rison* (1885), 30 Ch. Div., 390 at pp. 392,
393.

(2) *Ib., per Fry, L. J.,* at p. 395.

(3) Succession Act, s. 71. *Arumu-
gam v. Anni* (1863), 1 M. H. C.,
400; *Bhoobun Mohini v. Hurrish
Chunder* (1878), 4 Cal., 23; s. c., 5
I. A., 138; *Akhoy Chunder v. Kala-*

pahar (1885), 12 Cal., 406; s. c., 12
I. A., 198.

(4) *Per Lord Cranworth, Abbott v.
Middleton* (1858), 7 H. L. C., 68 at p. 89,
cited by the P. C., *Indar Kunwar
v. Jaipal Kunwar* (1888), 15 Cal., 725
at p. 749; s. c., 15 I. A., 127 at p. 147.

(5) Succession Act, s. 72.

surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displaces that assumption.(1)

Rule 4. The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a codicil is to be taken as forming part of a will. (2)

There are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly.(3) The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator and to determine upon a reading of the whole will,

(13) *Per* Turner, L. J., *Sreenulty Soorjeemoney Dossee v. Dinobundoo Mullick* (1857), 6 M. I. A., 526 at pp. 550, 551.

(1) Succession Act, s. 69. *Amir-hayyan v. Ketharamayyan* (1890), 14

Mad., 65 at p. 69; *Skerrate v. Oakley* (1798), 7 T. R., 492, 494.

(3) *Per* Knight Bruce, L. J., *Key v. Key* (1853), 4 DoG. M. & G., 73 at pp. 84, 85.

whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred.(1) It is quite clear that, where a clause or an expression, otherwise senseless and contradictory, can be rendered consistent with the context by being transposed, the Courts are warranted in making that transposition.(2)

Rule 5. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense ; and words may be used in a wider sense than that which they usually bear, when it may be collected from the other words of the will that the testator meant to use them in such wider sense. (3)

Corollary.—If the same words occur in different parts of the will they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary. (4)

The main principle upon which you must proceed is, to give to all the words their common meaning : you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough.(5) It is, however, incumbent on those who contend for the limited construction, to show that a rational interpretation of the will requires a departure from that which ordinarily and *prima facie* is the sense and meaning of the words.(6) It is, however, a

(1) *Tagore v. Tagore* (1872), 9 B. L. R., 377 at p. 409 ; s.c., I. A., Sup. Vol., 47 at p. 79 ; 18 W. R., 359 at p. 371.

(2) *Jarman*, p. 465, and see cases cited there.

(3) Succession Act, s. 70.

(4) Succession Act, s. 73.

(5) *Per Rigby, L. J., Anderson v. Anderson* (1895), 1 Q. B., 749 at p. 755.

(6) *Per Knight Bruce, V. C., Parker v. Merchant* (1842), 1 Y. & C. Ch., 290 at p. 300.

general rule of construction that where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class.(1) But if the particular words exhaust a whole *genus* the general word must refer to some larger *genus*.(2) The mention of one particular class of things, coupled with general words, will not cut down the general words. Thus, under a bequest of furniture and other movable goods in a house, money will pass. On the other hand, if there is a long enumeration of particulars, such as furniture, plate, linen, and the like, followed by general words, the general words will be confined to things *ejusdem generis*; so that, for instance, money in the house would not pass.(3) In a gift of household furniture and effects, the word "household" is to be read as limiting effects as well as furniture. Such words pass lathes, sewing and copying machines, tools, an organ, pictures, books, wines and liquors, but not fowling pieces, a cow, a pony, a parrot, jewellery, or stock-in-trade.(4) But if it is clear that the gift is not meant to be residuary, and the large words, if not confined to things *ejusdem generis*, would carry the residue, they must be so confined. This is the case if there is an express residuary gift.(5) In *Mahomed Shumsool v. Shewukram*(6) the words "heir and *malik*" as applied to a woman were construed by the Privy Council in a restricted sense and their Lordships there say (7) : "In construing the will of a Hindu it is not

(1) *Per Pollock, C. B., Lyndon v. Standbridge* (1857), 2 H. & N., 45 at p. 51.

(2) *Per Willis, J., Fenwick v. Schmalz* (1868), L. R., 3 C. P., 313, at p. 315.

(3) *Theobald*, 7th Ed., p. 207, and

see cases cited there.

(4) *Ib.*, p. 205.

(5) *Ib.*, p. 227.

(6) (1874), 2 I. A., 7; s. c., 14 B. L. R., 231.

(7) P. 14.

improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family ; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." On the other hand in *Lala Ramjewan Lal v. Dal Koer*(1) the word *malik* as applied to a Hindu daughter was held to confer an absolute estate. The word *Dakhilar* though ordinarily meaning "occupant" was construed in reference to the context as possessor or manager without beneficial interest.(2) But where the language of a will is clear and consistent it shall receive its literal construction unless there is something in the will itself to suggest departure from it.(3)

The rule is distinct, that unless there is some very strong indication to the contrary, on the face of the will, the same words must mean the same thing in every part of the same will in which they are used.(4) But the same words applied to different subject-matter may bear a different meaning(5) and if words acquire a special meaning by reason of their context it is not safe to give that meaning to them when used in a different context.(6) It is dangerous where words have a fixed legal effect to suffer them to be controlled without some

(1) (1897), 24 Cal., 406. See also *Lalit Mohun Roy v. Chukkun Lall Roy* (1897), 24 I. A., 76 ; s. c., 24 Cal., 83 t.

(2) *Tarachurn v. Suresh Chunder* (1889), 16 I. A., 166.

(3) *Gurusani v. Sivakarni* (1895), 22 I. A., 119 at p. 128 ; where the Privy Council refused to construe the words "have issue" in a restricted sense

as meaning "leave issue."

(4) *Harvey v. Harvey* (1863), 32 Beav., 445.

(5) *Forth v. Chapman* (1719), 1 P. W., 667 (n) ; *Bamford v. Chadwick* (1854), 2 W. R., 531, 532.

(6) *Ballin v. Ballin*, *per Wilson, J.* (1881), 7 Cal., 224.

clear expression or necessary implication. The rule is that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. (1). Nor can a clear devise be altered, modified or cut down except by clear words to that effect. Thus a bequest by a Hindu testator of a four-anna share of a zemindari to his youngest widow and her son for their maintenance with power to them to alienate by sale or gift the property bequeathed was construed as conferring on each of the legatees an absolute interest in a two-anna share of the zemindary and it was held that the words "for your maintenance" did not reduce the interest of either legatee to one for life only. (2)

Rule 6.—Where any word material to the full expression of the meaning has been omitted it may be supplied by the context. (3)

With regard to the discretion of the Court to supply words in a will, the cases are very numerous, but I think they may be classed under two heads: the first is, when the will is in itself capable of bearing any meaning unless some words are supplied so that the only choice is between an intestacy and supplying some words; but even there, as in every case, the Court can only supply words if it sees on the face of the will itself clearly and precisely what are the omitted words, which may then be supplied upon what is called a necessary implication from the terms of the will and in order to prevent an intestacy. The second class of cases

(1) *Per Lord Redesdale, Jesson v. Wright* (1820), 2 Bligh., 56, 57.

(2) *Jogeswar Narain Deo v. Ram Chandra Dutt* (1896), 23 Cal., 670; 23 I. A., 37; overruling *Vydnada v. Nagammai* (1888), 11 Mad., 258, on the

question of the severance of the joint tenancy which had been created by the will between the widow and her son.

(3) Succession Act, s. 64, Illustration.

is like *Spalding v. Spalding* (1) where there is a clear and precise gift and a contingent limitation over, which is clearly expressed, but is not commensurate with the previous gift, the contingency being either in excess, as in many of the cases where the gift over has been upon a death without issue, and the Court has thought itself at liberty to curtail that gift over, by introducing the word "such" issue, or where there has been a defect, as in *Spalding v. Spalding* (1) and *Abbott v. Middleton* (2), where the limitation has been to one for life with remainder to his children, or to one in tail with remainder to his children, or to one in tail with a limitation over on a contingency, and the Court has held the gift over to be by way of substitution for the original gift, in the event of the original gift failing, and has found the contingency too narrow to fit that event, and has thought itself at liberty, from the whole context of the will, to supply words, there being a necessary implication that the gift over was intended to be reduced so as to suit the previous gift." (3)

If the contents of a will show that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made. (4)

(1) Cro. Car., 185.

(2) Jur. N. S., 1126. See also (1858), 7 H. L. C., 68.

(3) *Per* Sir W. Page Wood, V. C.,

Hope v. Polte, (1857), 3 K. & J., 209.

(4) *Per* K. Bruce, L. J., *Pride v. Fooks* (1858), 3 DeG. and J., 266, 267.

LECTURE VII.

Rule 7. A wrong description does not avoid a bequest.(1)

Falsa demonstratio non nocet: This practically includes the two maxims *Nihil facit error nominis cum de corpore constat*(2), and *Veritas nominis tollit errorem demonstrationis*(3), an illustration of the first maxim is given in illustration (a) to s. 63 of the Succession Act which is taken from *Stockdale v. Bushby*(4), where the devise was as follows: "I give and bequeath to my namesake Thomas Stockdale the second son of my brother John Stockdale over and above his equal share with his brothers . . . the sum of £ 1,000 . . ." Thus where there was a devise to the "second son of *Edward Weld* of Lulworth" and it appeared there was no such person as *Edward Weld* of Lulworth but it appeared from the evidence as to the state of the family that *Joseph Weld* was the then possessor of Lulworth who had a second son named Thomas it was held that it was a good devise to Thomas.(5) These decisions go upon the principle that there is something either of legitimate extrinsic evidence or of internal evidence, not only to show that the name must have been put wrongly, but also to show who must have been intended.(6)

(1) Succession Act, ss. 63, 65.

(1791), 1 Ves. Jun., 266.

(2) 2 Co., 21.

(5) *Camoys v. Blundell* (1848), 1 H. L.

(3) 1 Ld. Raym., 303.

C., 778.

(4) (1815), 19 Ves., 381; *Pitcairne v. Brase* (1878), *Finch*, 403; *Dowson v. Sweet*, 1 Amb., 175; *Parsons v. Parsons*

(6) *Per Lord Cranworth*, L. C., *Mostyn v. Mostyn* (1854), 5 H. L. C., 155 at p. 162. In that case there was a

Illustrations (b) and (c) of the section are based on the second of these maxims.(1) Illustration (c) is taken from *Garth v. Meyrick*, (2) where the testator left the residue to his six grandchildren by name, but the name of *Ann* was repeated, and that of *Elizabeth*, another grandchild, omitted; but it was decreed in favour of all the grandchildren, and that *Ann* took but one share, and *Elizabeth* should be admitted to the share mistakenly given to *Ann* by the repetition of her name.(3)

It has been laid down as a general principle that *prima facie* the right name is to govern and that the *falsa demonstratio* is not to take away the *veritas nominis*(4), but it is submitted that no hard and fast rule can be laid down and that the construction must depend on the facts of each particular case.(5)

Persona designata is a person pointed out or described as an individual, as opposed to a person

devise to Samuel, John, and Mary. There was no John but a son named Thomas who was born between Samuel and Mary. It was held however on the evidence that Thomas could not have been meant and that in consequence he took nothing under the devise.

(1) See *Newbolt v. Price* (1844), 14 Sim., 354, where there was a bequest to John Newbolt, second son of William Strangways Newbolt, Vicar of Somerton. The Vicar of Somerton was William Henry Newbolt. His second son was Henry Robert and his third son John Price. It was held that John Price Newbolt was entitled to the legacy. *Standen v. Standen* (1795), 2 Ves., 589.

(2) (1779), 1 Bro. C. C., 30.

(3) The portion of the decree as regards this declaration ran as follows: *Declare that the defendant E.M. though not actually named in the said testator's will is nevertheless entitled to a share of the clear residue, &c.* A testator in giving instructions for the preparation of his will directed that a bequest of £10,000 should be given

to each of his unmarried daughters "Georgiana" and "Florence." By inadvertence the conveyancing counsel in settling the draft inserted the word "Georgiana" in both clauses of the will relating to the gifts to the unmarried daughters so that there were two gifts of £10,000 to "Georgiana" while Florence was left totally unprovided for. This error was repeated in the engrossed copy of the draft which was ultimately executed by the testator. The draft of the will and an epitome of it were taken to the testator but the draft was not read over to him only the epitome in which the names of Georgiana and Florence were correctly given. Probate of the will omitting the name of Georgiana was granted to the executors. *In the Goods of Boehm* (1891), L. R. P., p. 247.

(4) *Garner v. Garner* (1860), 29 Beav. at p. 116. See *Giltell v. Gane* (1870), L. R., 10 Eq., 29.

(5) See *In re Nunn's Trusts* (1875) L. R., 19 Eq., 391.

ascertained as a member of a class, or as filling a particular character. Thus, if a testator bequeaths property to his children as a class, only those who fill that character at his death, that is, the survivors, can participate in the gift, while if he bequeaths it to them as *personæ designatae*, the children of such of them as have died during his lifetime will take their parent's shares under the 33rd section of the Wills Act. So property may be given to an illegitimate child as *persona designata*, but not as a child simply.(1)

Where a testator made the following bequest "and as I am desirous of adopting a son, I declare I have adopted *K*... My wives shall perform the ceremonies according to the Shastras, and bring him up When he comes to maturity the executors shall make over everything to him and it appeared that all the necessary ceremonies for the completion of the adoption had not been performed it was nevertheless held that the devise to *K* was good inasmuch as it was a devise to a designated person.(2) Where a bequest was made to a devisee by name and the testator in his will stated that he had adopted him as his son but it was found that the alleged adoption was as a matter invalid, it was held that as the bequest was to the devisee by name and was not dependent on his adoption, it was a valid bequest.(3)

If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description

(1) Sweet's Law Dict., 602. S. 33 of the Wills Act (7 Will. & 1 Vict., c. 26) is practically the same as s. 96 of the Succession Act, the word 'issue' being used in s. 33 of the Wills Act where the words 'lineal' descendant are used in s. 96 of the Succession Act.

(2) *Nidhoomont v. Saroda* (1876), 3 I. A., 253; 26 W. R., 91. *Subbarayer v. Subbamal* (1900), 27 I. A. 163; 24 Mad., 214.

(3) *Bireswar v. Ardha* (1892), 19 I. A., 101; 19 Cal., 452.

do not apply, such parts of the description shall be rejected as erroneous and the bequest shall take effect. (1) Section 63 of the Succession Act deals with misdescription of legatees while section 65 deals with misdescription of legacies. This maxim is applicable to a case where some subject-matter is devised as a whole under a denomination which is applicable to the entire land, and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent, universal or generic denomination. Then the ordinary principle and rule of law, which is perfectly consistent with common sense and reason, is this: that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift. (2) Where the description is made up of more than one part, and one part is true but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. (3) The rule is a rule of good sense. If the language is clear, but does not fit because of some of the words

(1) S. 65, Succession Act.

(2) *Per Lord Westbury*, L. A., *West v. Lawday* (1865), 11 H. L. A., 375 at p. 384. See *Homer v. Homer* (1877), 8 Ch. Div., 758, where a testator devised all his lands "situated at or within *D* in the occupation of *J.*" The testator was seized of two farms both in the occupation of *J.* the greater part of each of the farms was within the parish of *D*, but three closes of one and one close of the other were respectively situate in an adjoining

parish. In each case the portion which was not in the parish of *D*, immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in one case, a high road, and, in the other, a fence. It was held that the devise comprised the four closes adjoining the parish of *D*.

(3) *Jarman on Wills*, 5th Ed., p. 742, cited with approval by *Lindley, M. R. Cowen v. Truesitt* (1899), 2 Ch., 309 at pp. 311, 312.

which have been inserted there, if it is possible to reject the part that makes it inapplicable, the Court will do so. (1) The doctrine is not to be cut down by saying that it is to be limited to cases where the false part of the description follows the true. That would be cutting down what is a rational and useful canon of construction. (2) To adopt the argument that in applying the doctrine of *falsa demonstratio* it is material in what part of the sentence the *falsa demonstratio* is found would be to reduce a very useful rule to a mere technicality. (3) The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all ; and so far as it is true, applies to one only. (4) The intention once found the erroneous description is treated as mere surplusage and is rejected following the maxim *utile per inutile non ritiatur*. (5)

Rule 8. If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it is not lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

This is section 66 of the Succession Act to which is appended the following explanation: "In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 65(6) are to be considered as struck out of the will. It is a well settled canon of construction that

(1) *Cowen v. Truefitt* (1899), 2 Ch., 309 at p. 312.

Fisher (1849), 4 Ex., 591 at p. 604.

(2) *Per* Sir F. H. Jeune, *ib.*, p. 313.

601

(3) *Per Rigby, L. J., ib., pp. 313, 314.*

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(3) *Per Rigby, L. J., id., pp. 313, 314.*
 (4) *Per Alderson, R. Norrell v.*

Rule 3

(6) S. 65 has been incorporated in Rule 3.

where a given subject is devised and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject. (1) Where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property and nothing more passes. (2) This rule incorporates Lord Bacon's maxim "*non accepi debent verba in demonstrationem falsam quæ competit in limitationem veram*" which means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true, and part are false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true. (3)

Rule 9. Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended. (4)

One mode of obtaining the intention of the testator is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like

(1) *Jarman*, 5th Ed., p. 749.

same will was before the Court.

(2) *Per Earle*, C. J., *Webber v. Stanley* (1864), 16 C. B. N. S., 698 at p. 752. The judgment in this case would appear to have the effect of overruling the judgment of Page Wood, V. A., in *Stanley v. Stanley* (1862), 2 J. & H., 491, where the

(3) *Per Anderson*, B., *Morrell v. Fischer* (1849), 4 Ex., 591 at p. 602. See *Smith v. Ridgeway* (1866), L. R., 1 Ex., 331; *Seal v. Taylor* (1894), 1 Ch., 316.

(4) Succession Act. s. 68.

nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give effect to expressions that are unmeaning or ambiguous.

Now, there is but one case in which it appears to us that this sort of evidence of intention can be properly admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted, in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will) the testator intended to express.

Thus if a testator devise his manor of *S* to *A B* and has two manors of North *S* and South *S*, it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls an "equivocation," *i.e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. (1) As to those cases in which the description in the will is applicable indifferently to, and correctly describes, more than one subject, the principle upon which they proved may, perhaps, be explained; for in such cases, although the words do not *ascertain* the *very* subject intended.

(1) *Per Abinger, C. B., Hiscocks v. Hiscocks* 4 Ves. Jun., 680; *Miller v. Travers Hiscocks* (1839), 5 M. & W., 363 at (1832), 8 Bing., 244; *Dowd. George Gord* pp. 368, 369. See *Price v. Page* (1799), *v. Needs* (1836), 2 M. & W., 129.

they do *describe* it. The effect of evidence is only to confine the language within one of its natural meanings. The Court merely rejects; and the intention which it ascribes to the testator .(sufficiently expressed) remains in the will. An averment to take away *surplusage* is good, but not to increase that which is defective in the will of the testator. Or, perhaps, the more simple explanation is, that the evidence only determines what subject *was known to the testator* by the name or other description he used.(1) It has been held that when a person has once been fully described by name and description, and then there is a gift to a person of the same name, the first person must be intended, and evidence is therefore not admissible to show that there is another person of the same name.(2) Where there is a devise to a relation and there are two persons answering to the same name as that given in the devise of whom one is legitimate and the other is illegitimate, it is the rule of law that the legitimate relation is to be preferred to an illegitimate one.(3) It is of course obvious that where no person or thing accurately answers the description no equivocation arises.(4)

Rule 10. Where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intention of the testator shall be admitted.(5)

Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible.

(1) Wigram on Wills, 2nd Ed., pp. 90 & 91. See *Richardson v. Watson* (1833), 4 B. & Ad., 787.

(2) *Doe v. Westlake* (1820), 4 B. & Ald., 57; *Webber v. Corbitt* (1873), 16 Eq., 515. But see *Theobold on Wills*, 7th Ed., who adds (p. 133): It would not be safe to assume that there is such a rule. It

must depend upon the circumstance of each case.

(3) *In re Fish Ingram v. Rayner* (1894), 2 Ch., 83.

(4) *Drake v. Drake* (1860), 8 H. L. C., 172.

(5) Succession Act, s. 68.

sible to prove what the testator intended, and the will (.) will be void for uncertainty.(1) That is to say that, if a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible—in other words—that the judgment of a Court in expounding a will must be simply *declaratory* of what is *in* the will.(2) That test to be applied in each particular case is this—Do the words of the will, when all the circumstances of the case are known, express the intention of the testator? The Court which interprets the will must be satisfied that they do so, and no other rule can, in the abstract, be laid down.(3)

Where a testator made the following devise in his will “I hereby direct that my executor and trustee shall from out of any of my moneys that he may receive, retain in his hands and control a sum of rupees five hundred, out of which he will disburse various petty pensions to some poor people, who have been mentioned to him by me” it was held that there was a deficiency on the face of the will as to the objects of his bequest, and that by section 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator.(4)

(1) *Wigram, Prop. VI*, p. 65.

(2) *Ib.* at p. 69.

(3) *Ib.* at pp. 76, 77.

(4) *Admr.-Genl. v. Money* (1892), 15 Mad., 448, 473.

LECTURE VIII.

Rule 11. If full effect cannot be given to the intention of the testator, effect is to be given to it as far as possible.(1)

WHILE Rule 3 is one of the fundamental rules in interpreting wills it sometimes happens that owing to the operation of law full effect cannot be given to the expressed intention, as, for instance, where the expressed intention points to an illegal object. In such cases the Court is not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can.(2) Thus in cases of wills governed by the Succession Act directions to accumulate the income arising from any property is void.(3) Yet effect is given to such direction where the property is immovable or where accumulation is directed to be made from the death of the testator to the extent of the income arising from the property within one year next following the testator's death.(4) As regards wills of Hindus a trust for perpetual accumulation is void(5) but as to how far a Hindu is entitled to direct accumulations by his will does not yet seem to be

(1) Succession Act, s. 74. The illustration to this section is no guide to the construction of Hindu wills as s. 105 of the Succession Act does not apply to the wills of Hindus.

(2) *Per Buller, J., Thellusson v. Woodford* (1799), 4 Ves, Jun., 325. Williams on Executors, 10th Ed., Vol. I, p. 843.

(3) S. 104.

(4) *Ib.*, Exception.

(5) *Kumari Asima Krishna Deb v. Kumara Kumara Krishna Deb* (1868), 2 B. L. R., O. C., 11; *Krishnaramani Dasi v. Ananda Krishna Bose* (1899), 4 B. L. R., O. C., 231; *Soekhmooy Chunder Dass v. Monohuri Dasi* (1885), 12 I. A., 103; 11 Cal., 684. As regards Mahomedan Law see *Abdul Fata Mahomed v. Russomoy Dhur Chowdhry* (1894), 22 I. A., 76; 22 Cal., 619.

definitely settled. While a direction to accumulate, the effect of which would have been to postpone the enjoyment of an absolute gift, has been held to be invalid on the ground that it was inconsistent with or repugnant to such gift ; (1) it has also been held that it is incompetent for a Hindu with proper limitations to direct an accumulation of the income of property which under his will vests in his executors or trustees, and further that if accumulations are permissible then in the absence of special provision the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by the testator. (2) But when this case went up on appeal, although the Court did not decide this point, Trevelyan, J., made the following remarks on the question of accumulations (3) :—“ I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate. The fact that in cases where there is a minor beneficiary, accumulation can be allowed, and that it may be possible to accumulate income for the purpose of paying debts does not to my mind help us. In the former case accumulation is rendered necessary by the incapacity of the beneficiary and is allowed in order that he may obtain the greater benefit from the gift which is made over to him. In the latter case, the direction to accumulate is in aid of the proper administration of the testator’s estate and is sometimes necessary for the due performance of his legal and moral obligation to pay his debts.”

(1) *Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry* (1882), 8 Cal., 378. See also *Srimati Brahma-mayi Dasi v. Joges Chandra Dutt* (1871), 8 B. L. R., 400; *Makroonda Lal Shaw v. Ganesh Chandra Shaw* (1875), 1 Cal., 104.

(2) *Per Jenkins, J., Amritalal Dutt v. Sarnamoyi Dasi* (1897), 1 C. W. N., 345, at p. 365; 24 Cal., 589 at pp. 614, 615.

(3) *Amritalal Dutt v. Sarnamoyi Dasi* (1898), 2 C. W. N., 345 at p. 396; 25 Cal., 662, at p. 691.

The principle upon which this rule is based is thus expressed by Lord Kenyon, C. J. (1) : "In the construction of a will we must first look to the general intent of the devisor and give effect to that, and if there be a secondary intent which interferes with it, we are to reconcile the whole as far as we can but at all events to give effect to the general intention." But giving effect to a general intent at the sacrifice of a particular intent should not be done without an actual necessity. (2) Thus the general intention to create a known estate of inheritance ought to be given effect to and a particular intention to deprive it of its legal incidents ought to be disregarded as an attempt to legislate. (3) For a private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate and such gift must fail. (4) Thus an attempt to create an estate tail by a Hindu is void. (5)

Charities are also so highly favoured in law, that they have always received a more liberal construction than the law will allow in gifts to individuals. In the first place the same words in a will, when applied to individuals, may require a very different construction, when they are applied to the case of a charity. If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards he appoints no executor; or if, having appointed an executor, the latter dies in the lifetime of the testator, and no other person is appointed in his stead; in either

(1) *Doe d. Bean v. Halley* (1798), 8 T. R., 5 at p. 9.

(2) *Per Lord St. Leonards*, L. C., *Monypenny v. Dering* (1852), 2 De Gex. M. & G., 145 at p. 177.

(3) *Tagore v. Tagore* (1872), 9 B. L. R., 377 at p. 406.; I. A., Sup. Vol., 74

at p. 76.

(4) *Tagore v. Tagore*, 9 B. L. R., 394; I. A., Sup. Vol., 65.

(5) *Kumar Tarakeswar Roy v. Kumar Soshi Shikareswar* (1883), 10 I. A., 51.

of these cases, as these are bequests to individuals, the testator will be held intestate ; and his next-of-kin will take the estate. But if a like bequest be given to the executor in favour of a charity, the Court will, in both instances, supply the place of an executor, and carry into effect that very bequest, which, in the case of individuals, must have failed altogether.(1) Another principle, equally well established, is, that, if the bequest be for charity it matters not how uncertain the persons or the objects may be ; or whether the persons who are to take, are *in esse* or not ; or whether the legatee be a corporation capable in law of taking or not ; or whether the bequest can be carried into exact execution or not ; for in all these and the like cases, the Court will sustain the legacy, and give it effect according to its own principles. And where a literal execution becomes inexpedient or impracticable, the Court will execute it, as nearly as it can, according to the original purpose, or (as the technical expression is) *cy près*. This doctrine seems to have been borrowed from the Roman Law ; for by that law, donations for public purposes were sustained and were applied, when illegal, *cy près*, to other purposes, at least one hundred years before Christianity became the religion of the empire.(2) If the testator has manifested a general intention to give to charity, the failure of the particular mode, by which the charity is to be effected, will not destroy the charity. For the substantial intention being charity, equity will substitute another mode of devoting the property to charitable purposes, although the formal intention as to the mode cannot be accomplished. The same principle is applied when the per-

(1) Story, Eq. Jur., 2nd Ed., § 1165.

Mitter v. Admir.-Genl. of Bengal (1901),

(2) *Ib.*, § 1169; *Fanindra Kumar*

6 C. W. N., 321.

sons or objects of the charity are uncertain or indefinite, if the predominant intention of the testator is still to devote the property to charity.(1) All these doctrines proceed upon the same ground, that is, the duty of the Court to effectuate the general intention of the testator. And, accordingly, the application of them ceases whenever such general intention is not to be found. If, therefore, it is clearly seen that the testator had but one particular object in his mind, as, for example, to build a church at *W.*, and that purpose cannot be answered, the next-of-kin will take, there being, in such a case, no general charitable intention. So if a fund should be given in trust, to apply the income to printing and promoting the doctrines of the supremacy of the Pope in ecclesiastical affairs in England, the trust would be held void on grounds of public policy; and the property would go to the personal representatives of the party creating the trust; and it would not be liable to be applied to other charitable purposes by the crown, because it was not intended to be a general trust for charity.(2)

Where a testator bequeathed the interest of a fund to "The Calcutta Armenian Orphans College Funds for the relief and enjoyment of the poor families, widows, orphans, and schools of the Armenian nation" and at the time of her death there was a charity in Madras called "The Armenian Orphans College" but that there was none in Calcutta or elsewhere answering the description of the Calcutta Armenian Orphans College, there being only two charitable institutions in Calcutta which provided for the relief and enjoyment of the poor families, widows, orphans and schools of

(1) *Story*, § 1181; *Mayor of Lyons v. Advocate-General of Bengal* (1876), 3 I. A., 32 at p. 54; 1 Cal., 303 at p. 318.

(2) *Story*, § 1182.

the Armenian nation of which one, the Church of St. Nazareth, distributed money amongst and gave relief to the poor families, widows and orphans of the Armenian community and the other, the Armenian Philanthropic Academy, educated gratuitously the poor and orphans of the same community the Court held that the testatrix in the bequest in question had a general charitable intention in favour of the poor families, widows, orphans and schools of the Armenian nation *at Calcutta* and not a special intention to benefit any particular institution and that therefore the doctrine of *cy près* applied and it directed that the interest of the fund should be equally divided between the two Calcutta institutions.(1)

Where a testator was maintaining a *sadávarat* during his lifetime and by his will he directed that this *sadávarat* should continue to be maintained out of his estate and that his executors should maintain in addition another *sadávarat* out of the income of the estate it was held that the bequest to the second *sadávarat* was not void for uncertainty, as it was the clear intention of the testator that this *sadávarat* should be on the same scale as the other, and there would, therefore, be no difficulty in ascertaining the nature of the *sadávarat* to be established and the sum to be expended on it.(2) Where a fund was bequeathed for the purposes of *dhurm* and *sadávarat* and it was held that the gift to *dhurm* was invalid but that the gift to the *sadávarat* was valid; it was further held that one half of the fund should be appropriated to the *Sadávarat* and that the other half was undisposed of.(3)

(1) *Longbottom v. Satoor* (1863), 1 Bom., 1; *Morarji v. Nenbai* (1892), 17 M. H. C. R., 429; see *Malchus v. Broughton* (1886), 13 Cal., 193.

(2) *Jannabai v. Khimji* (1889), 14 Bom., 351.

(3) *Morarji v. Nenbai* (1892), 17

Rule 12. Where two clauses in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.(1)

This rule embodies the maxim "*Quam duo inter se pugnantia reperiuntur in testamento, ultimum ratum est.*"(2) The reason for this rule is to be found in the nature of a will, which is ambulatory and revocable during the testator's lifetime. Therefore when they are inconsistent and cannot possibly stand together a subsequent will prevails over a prior will, a codicil prevails over a bequest in the will of which it is a codicil and a subsequent codicil prevails over a prior one. But this rule is never applied except on the failure of every attempt to give to the whole such a construction as will render every part of it effective.(3) In the attainment of this object the local order of the limitations is disregarded, if it be possible by the transposition of them to deduce a consistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to *A* in fee, and in a subsequent clause give the same lands to *B* for life, both parts of the will shall stand; and, in the construction of law, the devise to *B* shall be first, the will being read as if the lands had been devised to *B* for life, with remainder to *A* in fee.(4) Again where there are two devises in fee of the same property the devisees take concurrently. "If in one part of a will, an estate is given to *A* and afterwards the same testator gives the same estate to *B*, adding words of exclusion, as 'not to *A*' the repugnance would be complete, and the rule would apply. But if the same thing be given, first to *A*, and then to *B*, unless it be some indivisible

(1) Succession Act, s. 75.

(2) Co. Litt., 112 (b), where two clauses repugnant to each other are found in a will, the last prevails.

(3) *Amirthayyan v. Kotharamayyan*

(1890), 14 Mad., 65 at p. 70.

(4) Jarman, 5th Ed., Vol. I, 439.

chattel, as in the case which Lord Hardwicke puts in *Ulrich v. Litchfield* (1), the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule, as laid down by Lord Coke and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate or revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument each may take a moiety; though had the second gift been in a subsequent will, it would, I apprehend, work a revocation.(2) But in cases of two inconsistent clauses, it is a settled and invariable rule not to disturb the prior devise further than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition(3) and where there is a clear gift in a will it cannot afterwards be cut down except by something, which, with reasonable certainty, indicates the intention of the testator to cut it down(4) and where you find a gift in clear and express terms you are not to permit subsequent and less distinct words to throw a doubt upon the former clear expressions.(5) The will of a testator must *prima facie* at least, be taken to refer to that which is the subject of his disposition; the property which he has himself to give; and, if he has evinced his intention to give the property, very strong and clear language must be required to countervail that intention, and subject the property which he has once given to his further disposition.(6)

(1) (1742) 2 Atk., 372.

(2) *Per* Lord Brougham, *Sherratt v. Benthy* (1834), 2 My. & K., 165.

(3) *Jarman*, 5th Ed., Vol. I, p. 438.

(4) *Ib.*, 443.

(5) *Bechar v. P. DeCruz* (1895), 19

Bom., 770 at p. 773.

(6) *Soorjeemony Dasee v. Denobundhu Mullick* (1857), 6 M. I. A., at p. 552.

Rule 13. A will or bequest not expressive of any definite intention is void for uncertainty.(1)

In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators ; no degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words and sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together; but if, after every endeavour, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate ; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication.(2) As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court, or if the trustee dies the Court itself can execute the trust—a trust therefore which in the case of mal-administration could be reformed and a due administration directed, and then, unless the subject

(1) Succession Act, s. 76.

(2) Jarman, 5th Ed., Vol. I, p. 326.

and objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform mal-administration nor direct a due administration.(1) Therefore, when we are dealing with general words, we must consider whether there is such an indication of purpose or trust that the Court if called upon to execute it, can see what it has to do—can see the limits of its own powers.(2) The following are instances of bequests void for uncertainty. A direction by a testator to his executor to lay out and expend such portion of his estate as the latter might in his discretion think necessary and proper in and towards the construction and erection of a pucca bathing *ghâut* at a suitable place in the river Hooghly to be surmounted by a chadney; and two temples for Siva, for whose daily worship a monthly allowance was to be made by the executor, the amount whereof was to be in his absolute discretion, and a further direction that the executor was to hold the rest and residue of the property and to invest the accumulations thereof to the best advantage.(3) A direction that if after the performance of all the other directions contained in the will there should remain any money, the executor was to spend it in proper and just acts for the testator's benefit.(4) A direction that the executors were to give to the testator's brothers, their wives and children, according to their (the executors') wishes.(5) "Dharam" has been defined to be law, virtue, legal or moral duty,(6)

(1) *Morice v. Bishop of Dosham* (1804), 9 Ves. Jun., 399; 10 Ves. Jun., 521 at p. 539, cited with approval in *Runchordass v. Parvatibai* (1899), 26 I. A., 71 at pp. 80, 81; 23 Bom., 725 at p. 725; 3 C. W. N., 621 at p. 625.

(2) *Per Lindley, L. J., In re Macduff* (1896), 2 Ch., 451 at pp. 463, 464.

(3) *Surbomungola Debi v. Mohendro Nath* (1878), 4 Cal., 508.

(4) *Gokool Nath Guha v. Issur Lochun Roy* (1886), 14 Cal., 222.

(5) *Kumarasami v. Subbaraya* (1886), 9 Mad., 323.

(6) *Wilson's Glossary*, 137.

and bequests of property for *dharam*; *dharma* or *dharmada* have been held to be void for uncertainty. (1) But on the other hand apparently following the maxim *Id certum est quod certum reddi potest* the following devises have been held to be good “I do direct my trustee to spend suitable sums at the annual *shrads* or anniversaries of my father, mother, and grandmother, as well as of myself after my demise, for the performance of the ceremonies and the feeding of the Brahmins and the poor; to spend suitable sums for the annual contribution and gifts to the Brahmins, Pundits holding tolls (or native schools) for (the diffusion of Sanskrit) learning in the country at the time of the Doorga poojah. To spend suitable sums for the perusal of *Mohabharat* and *Pooran*, and for the prayer to God during the month of Kartick. (2) Also a bequest for the performance of ceremonies and giving feasts to Brahmins. (3) Also a devise “to get a Siva’s temple erected at a reasonable cost in a suitable place within the compound of the brick-built *baitakhana* house, inclusive of the building and the garden thereto”, the testator having constantly resided in that house. (4)

Rule 14. The description, contained in a will, of property the subject of the gift, shall, unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering that description at the death of the testator. (5)

The section was intended to give effect to what has been called a generic disposition, so as to make it in-

(1) *Gangabai v. Thavar Mulla* (1863), 1 B. H. C. R., 71; *Cursandas v. Vandra-vandas* (1889), 14 Bom., 482; *Morarji v. Nenbai* (1892), 17 Bom., 351; *Devshankar v. Motiram* (1893), 18 Bom., 136; *Runchordas v. Parvatibai* (supra).

(2) *Dwarka Nath Bysack v. Burroda Persaud Bysack* (1878), 4 Cal., 443; see

Krishnaramani Dasi v. Ananda Krishna Bose (1869), 4 B. L. R. (o.c.) 231.

(3) *Lakshmisankar v. Vaijnath* (1881), 6 Bom., 24.

(4) *Gokool Nath Guha v. Issur Lochan Roy* (1887), 14 Cal., 222.

(5) Succession Act, s. 77; See 1 Vict., c. 26, s. 24; on which this rule is founded.

clude all property of the kind described belonging to the testator at the time of his death. Obviously it is not necessary to the application of the section that it should be shown that the testator intended that the after-acquired property should pass. If he had no intention on the subject, the after-acquired property will pass by force of the provision. The Statute requires that the will shall show upon the face of it a contrary intention, that is, an intention that the after-acquired property shall not pass.(1) But it does not say that we are to construe whatever a man says in his will as if it were made on the day of his death.It is to be observed that the act speaks of it—that is the will. When there is a puzzle as to which clause of the will carries a particular property, the Statute does not say which clause is to outweigh the other, but only that the property is to be comprised in the will. Be it so. The question still remains which clause carries the property, the residuary or specific devise.(2) The effect of sec. 24 of the Wills Act is not to alter the law of specific legacies. The only effect is that, to ascertain what is comprised in a specific bequest, it is necessary in all cases to consider the will as made immediately before the testator's death. There is only one exception to this rule and that is where the testator refers to the date of the will as the point of time at which the *quantum* of property is to be ascertained. There is, however, another apparent exception to the rule, which is, where a testator has used words of such a character that it is doubtful whether or not they are sufficiently extensive to cover additions to the property made between the date of the will and that of his death.

(1) *Per Kay, J., In re Portal and Lamb* (1884), 27 Ch., 602.

(2) *Per Lindley, L. J., In re Portal and Lamb (on appeal)* (1883), 30 Ch., 55.

It is in the construction of gifts of this character that questions have usually arisen since the Wills Act.(1)

It may even happen that, by a strict application to specific gifts of the principle which makes the will speak from the death, a gift of this nature might be invalidated for uncertainty. For instance, if a testator, having a house in the Strand, devises it by the description of his house in the Strand, and afterwards acquires another in the same place, and holds both houses at the time of his decease, it is evident that the statutory provision would, in such case, by bringing both the houses within the terms of the description, render the devise void for uncertainty ; unless it could be ascertained by extrinsic evidence which of them was intended. To avoid such a consequence, probably it would be held that the fact of the testator's ownership of one house only at the date of the will was a sufficient indication of his meaning that house ; and yet this is, *pro tanto*, a departure from the principle of the enactment under consideration ; for had the devise been in terms of the house in the Strand which should belong to the testator at his decease, there would have been no ground for distinguishing between the house that belonged to him when he made his will, and that which he subsequently acquired : so that, if the extrinsic evidence failed to show which of the two houses was intended (if, indeed, evidence is admissible in such a case), the plurality would be fatal to the devise.(2)

But it is clear that words which merely import but do not emphatically refer to time present, as a general devise or bequest of property, or of property of a particular genus, of which "I am seized" or "am

(1) Williams on Executors, 10th Ed., Vol. II, pp. 1177, 1178.

(2) Jarman, 5th Ed., Vol. I, pp. 294, 295.

possessed" will generally include all, or all of that genus to which the testator is entitled at the time of his death, though acquired after the date of the will. And the effect of the Statute ought not to be frittered away by catching at doubtful expressions for the purpose of taking a case out of its operation.(1)

(1) Jarman, 5th Ed., p. 209. *Per Cotton, L. J., Everett v. Everett* (1877), 7 Ch. D. at p. 433.

LECTURE IX.

Rule 15. Where property is bequeathed to any person, he is entitled to the whole of the interest therein, unless it appears from the will that only a restricted interest was intended.(1)

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in *England*) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, although he adds a qualification which the law does not recognize.(2)

With this rule should be read section 159 of the Succession Act.(3) A devise of the rents and profits or of the income of land passes the land itself, both at law and

(1) Succession Act, s. 82.

(2) *Tagore v. Tagore* (1872), Sup. Vol. I. A., 47 at p. 65; 9 B. L. R., 377 at p. 395. See 1 Vict., c. 26, § 28; *Damodardas v. Dayabhai* (1898), 25 I. A., 126: 22 Bom., 833; 2 C. W. N., 417; *Lalit Mohun Singh Roy v. Chukkun Lall Roy* (1897), 24 I. A., 76; 24 Cal., 849; 1 C. W. N.,

390; *Bhoobun Mohini Debya v. Hurrish Chunder Chowdhry* (1878), 5 I. A., 138 at p. 147; 4 Cal., 23 at p. 27; 2 C. L. R., 339 at p. 342.

(3) Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the

in equity ; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits.(1) But a bequest of the rents and profits of an estate where there is no intention in the will to pass the estate is void.(2) Again where the estate was vested in trustees and the income was expressed to be given as maintenance it was held that the devise did not pass an absolute estate.(3) A direction that immovable property should be retained in the hands of trustees and that the balance of the rents, profits, etc., after the payment of expenses should be used and enjoyed by the testator's son in such manner as he might think fit, with a provision empowering the sons of such son to call him to account for the management of the property on attaining the age of twenty-one, and with a direct, though void, gift over to the grandsons of such son, was held to confer only a life-estate on the testator's son.(4) But in the same will a devise to the testator's son *G*, of the testator's remaining movable property to be dealt with by him as he should think proper with a proviso that when *G*'s sons should attain the age of twenty-one, such property should be divided and duly

bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

Illustrations.

(a) *A* bequeathes to *B* the interest of his five per cent. promissory notes of the Government of India. There is no other clause in the will affecting those securities. *B* is entitled to *A*'s five per cent. promissory notes of the Government of India.

(b) *A* bequeathes the interest of his 5½ per cent. promissory notes of the Government of India to *B* for his life, and after his death to *C*. *B* is entitled to the interest of the notes during his life ; and *C* is entitled to the notes upon

B's death.

(c) *A* bequeathes to *B* the rents of his lands at *X*. *B* is entitled to the lands.

(1) *Jarman*, 5th Ed., pp. 740, 741 ; *Blann v. Bell* (1852), 2 D. M. and G., 781 ; *Mannoe v. Greener* (1872), L. R., 14 Eq., 456 ; *Hemangini Dasi v. Nobin Chand Ghose* (1882), 8 Cal., 788 at p. 801 ; 11 C. L. R., 370 at p. 381.

(2) *Sookhmoj Chunder Dass v. Sri-mati Monohurri Dasi* (1885), 12 I. A., 103 ; 11 Cal., 684.

(3) *Bullubhdas v. Thucker* (1890), 14 Bom., 360.

(4) *Anandrao v. The Admir.-Genl. of Bombay* (1895), 20 Bom., 450.

received by *G* and his sons in equal shares was held to confer an absolute gift of the property to *G*.⁽¹⁾ Where property was given to a daughter and her son, and no power of alienation was given to the daughter while there was an express prohibition against alienation in so far as the son was concerned, it was held that the daughter took a life-estate with remainder to her son.⁽²⁾ But a bequest to a daughter and her son of a four-anna share of the testator's estate for their maintenance with power to alienate the same was held to confer an absolute estate on each of them of a two-anna share of the testator's estate.⁽³⁾

There have been varying decisions as regards devises of immoveable property to Hindu widows. In *Soorjeemoney Dossee v. Dinobundhoo Mullick*⁽⁴⁾ the following rules of construction were stated : "Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions that he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption." And in *Mahomed Shamsool v. Shewakram*⁽⁵⁾ a gift to the

(1) *Anandrao v. The Admir.-Genl. of Bombay* (1895), 20 Bom., 450.

(2) *Siva Ram v. Villa Bhatta* (1898), 21 Mad., 425.

(3) *Jogeswar Narain Deo v. Ram*

Chand Dutt (1896), 23 I. A., 37; 23 Cal., 670.

(4) (1857) 6 M. I. A. at p. 550.

(5) (1874) 2 I. A., 7 at pp. 14, 15; 14 W. R., 229.

widow of the testator's son who had predeceased the testator in which it was stated that except her "none other is or shall be my heir and malik" with a further qualification that the widow and her daughters "are and shall be heir and malik" was held only to confer a life-estate on the widow. In arriving at this conclusion their Lordships of the Privy Council state : "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family ; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." But a will made by a Hindu testator in English in which he gave, devised and bequeathed to her and her heirs and assigns for ever all his real and personal estates and effects and appointed her the sole executrix was construed as conferring an absolute estate on the widow(1) and a statement in a document held to be a testamentary document that the donor's widow and daughter were to be maliks of his property was held to confer an absolute estate.(2) But in *Koonjbehari Dhur v. Premchand Dutt*(3) it was laid down that the common rule of Hindu law is that, in respect of gifts by a husband to his wife, she takes immovables only for

(1) *Prosanno Coomar Ghose v. Tarucknath Sircar* (1872), 10 B. L. R., 267.

(2) *Mussamut Kollainy Koer v. Luchmi Persad* (1875), 24 W. R., 395.

(3) (1880) 5 Cal., 684 at p. 686, 687 ; followed in *Hira Bai v. Lakshmi Bai* (1887), 11 Bom., 573 at pp. 578, 579. There the case of *Prosanno Coomar Ghose v.*

Tarrucknath Sircar (1872), 10 B. L. R., 267, was distinguished on the ground that the widow was held to take a heritable interest, the devise being to her, her heirs, and assignees for ever ; and the case of *Seth Mulchand v. Bai Mancha* (1883), 7 Bom., 491, on the ground that there was an express power of alienation given to the widow.

her life, and has no power of alienation, while her dominion over movable property is absolute, and further that a Hindu wife takes, by the will of her husband, no more absolute right over the property bequeathed, than she would take over such property; if conferred upon her by gift during the lifetime of her husband; and that whether in respect of a gift or a will, it would be necessary for the husband to give her in express terms a heritable right or power of alienation. In *Hari Lall v. Bai Rewa*(1) the testator directed that after his death his wife was to take possession of and enjoy his property, and declared that just as he was the owner so she was to be the owner, but there were no words of inheritance used nor did he directly give his wife any power of disposition over the property. The Court held that the widow only took a life-interest in the property and in delivering judgment Farren, C. J., said (2): "The Courts have always leaned against such a construction of the will of a Hindu testator as would give to his widow unqualified control over his property. By the use of such expression as my wife is the owner after me, or my wife is the heir it is usually understood that the testator is providing for the succession during the lifetime of the widow and not altering the line of inheritance after her death." But in *Lala Ramjewan Lall v. Dalkoer* (3) it was held that the word 'malik' passed an absolute estate to the testator's daughters although there was a direction in the will that they should not be entitled to alienate the shares given to them. The provision against alienation was treated as void under section 125 of the Succession Act.

(1) (1895) 21 Bom., 376.

(2) *Ib.* at pp. 380, 381.

(3) (1897) 24 Cal., 407.

Rule 16. Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

This rule deals with substitutional gifts and its object is to provide for the death of the prior legatee before the period of distribution. A substitutional gift is of the nature of a remainder which has been defined as an estate which is so limited as to be immediately expectant on the natural determination of a particular estate limited by the same instrument.(1) It is therefore by nature quite distinct from an executory devise which is a limitation by will of a future estate or interest which cannot consistently with the rules of law take effect as a remainder; for it is well settled (and, indeed, has been remarked as a rule without an exception) that when a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder it shall not be construed as an executory devise.(2) The strong tendency of the modern cases certainly is to consider the word "or" as introducing a substituted gift in the event of the first legatee dying during the testator's lifetime; in other words, as inserted in prospect of, and with a view to guard against, the failure of a gift by lapse.(3) Moreover when an estate of inheritance is intended to be given which is void beyond the life of the donee and there is a gift over in a specified event substituted for the void gift such gift over may be good.(4) Where there

(1) *Jarman*, 5th Ed., p. 822.

(2) *Ib. See Javerbai v. Kalibai* (1891), 16 Bom., 492.

(3) *Jarman*, 5th Ed., Vol. I, p. 481.

See *Raikishori Dassi v. Debendronath Sircar* (1887), 15 I. A., 37; 15 Cal., 409.

(4) *Kumar Tarakeswar Roy v. Kumar Soshi Shikhareswar* (1883), 10

is a gift over in a Hindu will, to a class some of whom are not capable of taking the gift, it is submitted that such a gift will be construed as enuring to the benefit of those who can take.(1) Where there appears to be a general intention in favour of a class and a particular intention in favour of individuals of the class to be selected by another person, and the particular intention fails from the selection not being made, the general intention in favour of the class will be carried into effect.(2) That is where a power is given to appoint in favour of *A* or *B* (*A* and *B* being either classes or individuals) a gift in default of appointment is implied between *A* and *B*.(3)

Rule 17. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in this ordinary sense applicable shall take the legacy.(4)

A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons.(5)

A gift is made to a class when (whether the donees are individually named or not) it appears from the instrument of gift :

I. A., 51; 9 Cal., 952; 13 C. L. R., 62; *Raikishori Dassi v. Debendronath Sircar* (1887), 15 I. A., 37; 15 Cal., 409; *Bai Motirahoo v. Bai Mamoobai* (1897), 24 I. A., 93.

(1) *Ram Lall Sett v. Kanai Lall Sett* (1886), 12 Cal., 663; *Rai Bishen Chand v. Asmaida Koer* (1884), 11 I. A., 164; 6 All., 560; *Manjamma v. Padmana Bhayya* (1889), 12 Mad., 393; *Srinurasa v. Dandayudapani* (1889), 12 Mad., 411; *Krishnanath v. Atmaram* (1891), 15 Bom., 543; *Mangaldas v. Tribhuvandas*

(1891), 15 Bom., 652; *Tribhuvandas v. Gangadass* (1893), 18 Bom., 7; *Krishna Rao v. Benabai* (1895), 20 Bom., 571. But see *Raikishori Dasi v. Debendronath Sircar*, *supra*; *Khimji Jairam v. Mararji* (1897), 22 Bom., 533.

(2) *Burrough v. Philcox* (1840), 4 Myl. & C., 92; *Brown v. Higgs* (1799), 4 Ves., 708; (1800) 5 Ves., 495; (1803) 8 Ves., 561.

(3) *Jarman*, 5th Ed., Vol. I, p. 483.

(4) Succession Act, s. 85.

(5) *Jarman*, 5th Ed., Vol. I, p. 232.

- (a) That they are to take as persons coming within a general description (*i.e.*, as a true class); or
- (b) That although one general description will not cover the donees, yet that the donor intended them to take not as individuals, but as members of a body of persons.(1)

Generally speaking, the cases with reference to a set or class of persons have been decided according to the terms which have been used. A gift to "my children" is a familiar instance: it means persons holding a common relation to the testator. The same with regard to a gift to nephews and nieces. It is settled law that a gift is not the less a gift to a class because you name a particular individual. I may give as an instance a gift to "all my children including *John*." As Sir George Jessel put in *In re Allen* (2) a testator may, simply, by way of precaution, name an individual in the class description because he may have some suspicion that the individual is illegitimate, or something of that kind. Including in a general description a certain person as a member of a class where the testator himself treats that person as a member of that class, and naming him individually in the gift itself, does not make the gift less a gift to a class.(3)

Where a gift is made in terms which would make it a gift to a class simply but for the fact that the number of persons constituting the class is stated and is different from the real number, then the Court in the absence of anything to show that particular members of the

(1) Underhill and Strahan, Interpretation of Wills and Settlements, p. 69.

(2) (1881) 29 W. R., 480.

(3) *Per Chitty, J., In re Jackson* (1883), 25 Ch. D., 162, 165, 166.

class were intended, will reject the enumeration as a mistake and construe the gift as a gift to the class simply.(1)

A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others ; but a gift to individuals described by their several names and descriptions, though they may together constitute a class implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it ; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of *A* at a particular time, those who constitute the class at the time will take ; but if the legacy be given to *B*, *C* and *D*, children of *A*, as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might, at the time, constitute the class, or to certain individuals who, it was supposed, would constitute it ? (2)

In the case of a gift to a class, the time when the gift is to take effect in enjoyment is called the period of distribution. When the period of distribution is the date of the instrument of gift coming into operation, the gift is said to be immediate ; when it is a date

(1) Underhill and Strahan, p. 75.
In re Stephenson (1897), 1 Ch., 75, 81.

v. *Barber* (1838), 3 Myl. and C., 688, 695.

(2) *Per Cottenham, L. C., Barber*

subsequent to the instrument coming into operation, it is said to be postponed.(1)

Where a specific gift is made to each member of a class, whether it is immediate or postponed, no person can *prima facie* be entitled to take under it who did not belong to the class when the instrument came into operation.(2)

Rule 18. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.(3)

But if property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.(4)

In giving judgment in *Maseyk v. Ferguson* (5) Pontifex, J., said : "The first question in this case is, whether the defendant, Charles Bathurst Maseyk, who was born after the testator's decease, but before the

(1) Underhill & Strahan, p. 78. *In re Knapp's Settlement* (1895), 1 Ch., 91, 96.

(2) Underhill & Strahan, p. 79. As regards what has been held to be a gift to a class, see *Manjamma v. Padmanabhayya* (1889), 12 Mad., 393; *Mangaldas v. Tribhuvandas*, (1891), 15 Bom., 652; *Soudaminey Dossee v. Jogesh Chunder Dutt* (1876), 2 Cal., 262; *Ram Lall Sett v. Kanai Lall Sett* (1886), 12 Cal., 663; *Krishnarao v. Babaji* (1895), 20 Bom., 571; *Khimji v. Morarji* (1897), 22 Bom., 533; *Krishnanath v. Almuram* (1891), 15 Bom., 543; *Admr.-Genl. v. Money* (1892), 15 Mad., 448; *Cally Nath Naugh Chorodhry v. Chunder Nath* (1882), 12

Cal., 378; *Sally Mahomed v. Lady Janbai* (1901), 3 Bom. L. R., 785.

(3) Suc. Act., s. 98.

(4) *Ib*, exception. As regards the illustrations to this section, the rule laid down in the *Tagore* case must be applied when they are sought to be made applicable to wills of Hindus. This would make illustrations (a), (b) and (c) applicable in their entirety. In illustration (d) only the executor of C and D would take, in illustration (e) E would be excluded; in illustration (g) only D and E would take and in illustration (h) only C would take.

(5) (1878), 4 Cal., 671, at pp. 672, 673.

period of distribution mentioned in the will, can be admitted into the class of nephews and nieces to whom the testator bequeathed his residuary estate. I have already held in a former suit in the matter of this will that the children of the testator's brother took vested interests at his death, but it was not determined in that suit whether the class would open to admit an object born after the testator's death but before the period of distribution. Under the English law it is clear that such an object would be admitted into the class. But in this country the question is governed by section 98 of the Succession Act. I think the intention of the framers of that section was to assimilate the law here to that which exists in England, although the section, with its exception, and illustration (*h*) are not very happily expressed ; and I am prepared to hold in the present case that any child of the testator's brothers who was born before the period of distribution is entitled to participate as a member of the class ; and that the period of distribution in this gift is the date when any nephew or niece shall attain majority within the provisions of the Succession Act, or when any niece should marry whichever event should first happen."

" In dealing with a gift to a class you enquire first, at what period the class is to be ascertained—it may in the case of a will be on the death of the testator or at a later period.

" If the class is to be ascertained on the death of the testator, no question of remoteness can arise, and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is deferred to a later date, those who become members of the class within the extended period are admitted ; and subject to any

question of remoteness those who are thus capable of taking take. In either case, if any members of the class are incapable of taking because born after the date of ascertainment, they are simply excluded, and the rest take the whole; and this is so even if the gift be to persons born and to be born—*Spruckling v. Ranier*(1); *Ayton v. Ayton*(2); *Whitbread v. Lord St. John*(3); *Mann v. Thompson* (4). If any die in the testator's lifetime they are simply excluded, and the rest take the whole—*Stewart v. Sheffield*(5); *Re Coleman*(6). If the gift to one is revoked by codicil, he is simply excluded, and the rest take the whole—*Shaw v. McMahon*(7). If one is incapacitated from taking because he has attested the will, he is simply excluded and the rest take the whole—*Young v. Davies*(8); *Fell v. Biddulph*(9)."

"In many of the cases the decision was based upon the special doctrines of English Law applicable to joint tenancy. But *Fell v. Biddulph*(9) and *In re Colemen*(6) show that the rule is the same where no joint tenancy comes in."

The Indian Succession Act in section 98 declares the law applicable to wills governed by that Act in accordance substantially with the view I have explained."

As to the first part of the rule, the law is clear and simple: Provided there is or are any member or members of the class to take the gift when the instrument of gift comes into operation, then that member or those members are alone entitled to share in the gift unless an intention to the contrary appears on the face of the instrument.(10)

(1) (1761), 1 Dick., 344.

(2) (1787), 1 Cox, 327.

(3) (1804), 10 Ves. Jun., 152.

(4) (1854), Kay, 638.

(5) (1811), 13 East, 526.

(6) (1876), L. R. 4 Ch. D., 165.

(7) (1843), 4 Dr. & W., 431.

(8) (1863), 2 Dr. & S., 167.

(9) (1875), L. R. 10 C. P., 701.

(10) Underhill & Strahan, p. 82.

The second part of the rule is equally clear and certain. When the gift is postponed, whether the postponement arises through conditions expressly attached to the gift, as for example, by a condition that the share of each member of the class is to be paid to him only on his attaining the age of twenty-one, or through the nature of the property given, as by its being a remainder following a life-estate, in the absence of any words in the instrument of gift to the contrary effect, all persons who were members of the class at the time the instrument came into operation, or who became members of it before the period of distribution, belong to the class in whose favour the gift accrues. If the postponement arises through the property given being reversionary in its nature, it makes no difference whether the interest in possession was or was not created under the instrument of gift. Nor does it matter whether the interest given in the postponed gift is vested or contingent : Provided the whole gift is, in fact, postponed, the class to whom it is given will remain unfixed until it has become enjoyable in possession. If, however, the gift is partly immediate and partly postponed for the purpose of ascertaining the class, it will be regarded as an immediate gift, and only those belonging to the class when the instrument came into operation can claim under it. (1)

Rule 19. Where two legacies are made to the same persons in a will or a codicil, unless a contrary intention is shown, if the legacies are of the same specific thing, he is entitled to receive that specific thing only ; if the legacies are of the same amount or quantity of a thing, he is entitled to one such legacy only ; and if the legacies are of unequal amounts or of different specific things, he is entitled to both.

Corollary--Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

This Rule is incorporated in section 88 of the Succession Act, and for the purposes of this Rule the word "will" does not include a codicil. It deals with what are called cumulative legacies, and the principles on which it is based are thus stated in the commentary on *Hooley v. Hatton* (1) given in White and Tudor's Leading cases in Equity.(2) "Hooley v. Hatton has usually been referred to as containing a sound exposition of the law as to the repetition of legacies, when the point to be determined is, whether a second legacy is to be taken as substitutional or accumulative. The rules laid down in the principal case are (a) when the same specific thing is given twice, whether in the same or different instruments, it is one gift.

"But following the civil law, our law takes a distinction between *res* and quantity, and the second rule is, (b) that, where the legacies are given by different writings, the presumption is that they are accumulative, whether the amount be equal, greater or less.

"The third rule is, (c) that where legacies of the same amount are given by the same document, the presumption is that they are not cumulative." Mr. Justice Aston says: "The law seems to be, and the authorities only go to prove the legacy not to be double, where it is given for the same cause in the same Act, and *totidem verbis*, or only with a small difference." The first rule seems to follow *ex necessitate rei* 'the only question to be decided is whether there are separate articles referred to.'

Double gift of the same specific thing.—With regard to the first case mentioned by Mr. Justice Aston it is clear that where the same specific thing or *corpus* is given, either in the *same* instrument or in *different* instruments in the nature of the thing it can but be a repetition; for instance, there are two gifts of a ruby ring, and there is no pretence that there are two ruby rings. The second is the principal and most important rule. In commenting on the case of *Hooley v. Hatton* the Master of the Rolls said in *Barclay v. Wainwright*(1): “It is now too late to deny that it is settled and acquiesced in as a rule of the Court, that *simpliciter* and *prima facie* two different instruments giving legacies, whether of the same, or a larger amount, and more particularly of a different species, shall be held accumulative and not a substitution. That was determined in *Hooley v. Hatton*.”

Of course, the rule is merely a rule of construction, and must yield to clear expression or intrinsic evidence of intention that one legacy is to be in substitution for the other; but the express statement that some legacies are to be “in addition,” and the omission of those words as to others, is not sufficient to show that the latter are not to be cumulative. (2) Although *prima facie* legacies of equal amount given by the same instrument are held to be merely repetitions, there may be an intention to give both. Thus, where a testator directed his trustees to convert his personal estate and to stand possessed of the proceeds on certain trusts, among others, “on trust to pay £2,000 to each of his sons who should attain twenty-one.” and “on

(1) (1797), 3 Ves. Jun., 462 at p. 465.

(2) White and Tudor at p. 871; but see *Allen v. Callow* (1796) 3 Ves. 289; *Barclay v. Wainwright*, *ubi supra*;

Mackenzie v. Mackenzie (1826), 2 Russ, 262; *Wray v. Field* ib. 257, (a. c.) 6 Mad. & Gel. 300.

further trust to set apart and pay over the sum of £2,000 to each of his sons on their respectively attaining twenty-one" and further directed his trustees to divide the residue, "after full payment and setting aside of the sums directed to be paid and set aside," it was held that each son on attaining twenty-one was entitled to two legacies of £2,000 each.(1) Where the testator bequeathed a share of the residue of his personal estate to one of his sons by a codicil to his will, and a legacy of a sum of money to the same son by a subsequent codicil, the second bequest was treated as cumulative, and it was held that the son was entitled to take both.(2)

But it has been held that legacies bequeathed by a subsequent instrument have been meant to be substitutional and not cumulative where the later instrument has been described by the testator as his last will and testament, and not as a codicil to his former will, on the ground that while a codicil is professedly an addition to a will a subsequent will is professedly a substitution of a former will.(3) So also where a testator bequeathed a legacy to his daughter by the third codicil of his will which codicil he prefaced with the words "not having time to alter my will and to guard against any risk" it was held that the legacy was a substitutional one and not cumulative.(4) Where the same legacy was given by two codicils which were both executed at the same time and in the presence of, and attested by, the same witnesses, and contained practically the

(1) *Burkinshaw v. Hodge* (1874), 22 W. R., (Eng.) 484.

(2) *Gordon v. Anderson* (1858), 4 Jur. N. S. 1097; *Ledger v. Hooker* (1853), 18 Jur. 481.

(3) *Tuckey v. Henderson* (1863), 33

Beav. 174; *Kidd v. North*, (1845) 14 Sim 463; 2. Phill 91; *Jackson v. Jackson* (1788), 2 Cox. 35.

(4) *Russell v. Dickson* (1853), 4 Clarkes H. L. C. 293.

same provisions, it was held that the legacies given by the two codicils were substitutional and not cumulative.(1) Where it appears that the later gift is merely explanatory of the prior gift, the later gift is treated as substitutional and not cumulative.(2) Where in addition to the amounts being the same in both instruments, the testator connects a motive with both, and the express motive is also the same, the double coincidence induces the Court to believe that repetition and not accumulation was intended.(3) It must, however, be clear that the testator is expressing a motive and not merely giving a description; thus, in the case of gifts of equal amount to a "servant," the term "servant" is merely descriptive. (4)

Rule 20. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.(5)

No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, should be taken by a person there designated.(6)

But it is impossible to imply a gift when there is no certainty as to the persons who are supposed to take under it or as to the estate which they are to take by implication. There must be a reasonable degree of

(1) *Whyte v. Whyte* (1873), 17 Eq. 50.

(2) *Moggridge v. Thackwell* (1792), 1 Ves. 473.

(3) *Per Wigram, V. C., Suisse v. Lowther* (1843), 2 Ha at p. 432; *Benyon v. Benyon* (1810), 17 Ves. Jun. 34; *Hurst v. Beach* (1819), 5 Mad., 351, 358;

(4) *Theobolds*, 7th Ed. p. 161 citing *Suisse v. Lowther* (1843) 2 Ha., 424;

Rock v. Cullen (1848), 6 Ha., 531; *Wilson v. O'Leary* (1871), 12 Eq. 525; 7 Ch. 448.

(5) Succession Act, s. 89; Illust. (a)—*Leighton v. Barllie* (1834) 3 M. & K. 267 Illust. (b)—*Boys v. Morgan* (1838), 9 Sim., 289. See *In re Bassett's Estate* (1872), 14 Eq., 54.

(6) *Williams*, 10th Ed., Vol. II, p. 1195.

certainty as to those important matters before a gift can be implied.(1) Surplus and residue have identical meanings ; one meaning "that which is over", and the other that "which is left."(2) The words "should there be any surplus after the above expenditure were held to create a general residuary bequest;"(3) as also the words "after all these acts have been observed from the proceeds of the said property, if there be a surplus, then the family will be supported therefrom."(4) Where under a will there was a dedication of certain properties to an idol and a *sebait* was appointed, but the *sebait* died without taking charge of the property or fulfilling the office and there was no provision for the appointment of a fresh *sebait*, it was held that the property so dedicated passed under the residuary devise.(5)

When the residuary legatee is nominated generally, he is entitled, in that character, to whatever may fall into the residue after the making of the will by lapse, invalid disposition, or other accident ; or by acquirement subsequent to the date of the will.(6) "It has long been settled, that a residuary bequest of personal estate . . . carries, not only everything not disposed of, but everything that in the event turns out not to be disposed of : not in consequence of any direct or expressed intention ; for it may be argued in all cases, that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given away from him ; no ; for he does not contemplate the case ; the residuary legatee is to take only

(1) *Anandrao v. Admr.-Gen.* (1895), 20 Bom., 450, 465.

(2) *Per Pontifex, J., Dwarkanath Bysack v. Burroda Persaud Bysack* (1878), 4 Cal., 443 at p. 449 (s.c.) 1 C. L. R. 566; 571.

(3) *Ib.*

(4) *Ashutosh Dutt v. Doorgachurn Chatterjee* (1879), 6 I. A., 182; 5 Cal., 438; 5 C. L. R., 296.

(5) *Sarasundari Debi v. Gobindmani* (1868), 2 B. L. R. A. C., 137 n.

(6) *William on Executor*, 10th Ed., Vol. II, p. 1198.

what is left : but that does not prevent the right of the residuary legatee.(1) “ The general rule that a residuary clause passes a lapsed legacy—that which was intended to be the subject of bounty to another—is founded upon this, not that it effects, *in specie*, what the testator intended, for he probably contemplated nothing beyond the particular legacy taking effect, but because the residuary clause is understood to be intended to embrace everything not otherwise effectually given, . . . so that, upon failure of the particular intent, the Court gives effect to the general intent .”(2)

Rule 21. If a legatee does not survive the testator, unless a contrary intention appears in the will, the legacy lapses and forms part of the residue, unless such legacy comprises a portion or the whole of the residuary estate, in which case the share comprised in the legacy goes as undisposed of (3).

A testator may prevent a legacy from lapsing ; but the authorities show that in order to do that he must do two things : he must, in clear words, exclude lapse ; and he must clearly indicate who is to take in case the legatee should die in his lifetime.(4) Thus a devise to residuary legatees and to their respective executors, administrators, and assigns, followed by a declaration that the shares should be vested interests in each of the residuary legatees immediately upon the execution of the will was held not to prevent the bequest to one of the residuary legatees who died in the lifetime of the testator lapsing.(5)

(1) *Per Grant, M. R., Cambridge v. Rouse*, (1802) 8 Ves. Jun., 12 at p. 25.

(2) *Per Cottenham, L. C., Easum v. Appleford* (1840), 5 M. & Cr., 56 at pp. 61, 62. See *Dwarkanath Bysack v. Burroda Persaud Bysack*, (1878), 4 Cal., 443; *Ashootosh Dutt v. Doorga Churn Chatterjee*, (1879), 6 I. A., 182; 5 Cal., 438; 5 C. L. R., 296; Succession Act, s. 90.

(3) Succession Act, ss. 92-95.

(4) *Per Wickens, V. C., Browne v. Hope* (1872), 14 Eq. 343, 347. As regards alternative or substitutional gifts—*see Rule 16*.

(5) *Browne v. Hope* (1873), 14 Eq. 343. A will that designs to prevent the lapsing of a legacy must be specially penned. *Elliot v. Davenport* (1705), 1 P. Wm. 85, 86.

It therefore follows that in order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator; (1) for a testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. (2) In the cases such as the one contemplated by illustration (f) to section 92, namely, the testator and the legatee perishing in the same shipwreck, the question of survivorship is a matter of evidence merely, and, in the absence of evidence, there is no rule or conclusion of law on the subject. There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause: nor is there any presumption of law that all died at the same time. But the question is one of fact, depending wholly on evidence; and if the evidence does not establish survivorship of any one, the law will treat it as a matter incapable of being determined. And as the *onus* of proof lies on the representatives of the legatee, they cannot claim the legacy unless they can produce positive evidence that he was the survivor. (3)

Under the proviso unless a contrary intention appear in the will, the following kinds of bequests are included:—

(a) Gifts to a class, for, as has been pointed out before, when any member of the class predeceases the testator, his share is divided among those members who are alive at the period of distribution.

(1) Succession Act, s. 92.

(2) *Corbyn v. French* (1799), 4 Ves. Jun., 418, 435.

(3) *Williams on Executor*, 10th Ed., Vol. I, p. 955 and note; *Underwood v.*

Wing, (1855) 4 DeG. M. & G., 633; 19 Beav., 459; *Wing v. Angrave* (1860) 8 H. L. C. 183; See *Elliot v. Smith* (1882), L. R., 22 Ch. D., 237.

(b) Substitutional Gifts. These have been dealt with under Rule 16.

(c) Bequests to legatees as joint tenants. Where there is a devise or bequest to a plurality of persons as joint tenants, (*i.e.*,) who are not made tenants-in-common, no lapse can occur unless *all* the objects die in the testator's lifetime ; because as joint tenants take *per my et tout*, or, as it has been expressed, "each is a taker of the whole but not wholly and solely," any one of them existing when the will takes effect will be entitled to the entire property. (1) "If an estate is limited to two jointly, the one capable of taking the other not he who is capable shall take the whole. (2) In England a devise to two or more persons simply, it has long been settled, makes the devisees joint tenants. (3) As regards wills made by Hindus, the words "my wife and my daughter are my heirs. After my death all my property will devolve on my aforesaid wife and daughters" were construed as a joint gift to the wife and daughter, (4) and in *Nana Tara v. Allarakhia* (5) where there was a bequest of the residue to two daughters with the words "but they are mutual heiresses to

(1) *Jarm.*, 5th Ed., 310; *Williams*, 10th Ed., Vol. 1, p. 963; *Succession Act*, s. 93.

(2) *Per Handwicke, L. C., Humphrey v. Tayleur* (1752) 1 *Amb.*, 137; *S. A. sub nom Humphrey v. Taylor*, 1 *Dick.* 162; *Nandi Singh v. Sita Ram* (1888), 16 *I. A.* 47; 16 *Cal.*, 677, 682.

(3) *Jarm.*, 5th Ed., Vol. II, p. 1115;

Morley v. Bird (1798), 3 *Ves.* 629 at p. 631. *Crooke v. De Vandes* (1803), 9 *Ves.* 197, *per Lord Eldon, L.C.* at p. 204.

(4) *Bahoo Kooldebnarain Shahu v. Mussamut Wooman* (1863), *Marsh.* 357; 2 *Hay*, 370; See *Mussamut Kollany Koer v. Luchmee Persad* (1875), 24 *W. R.* 395.

(5) (1864) 4 *Bom.*, 573 n.

one another should any thing happen to either." Couch, C. J., in holding that this must be construed as a simple bequest to the two daughters of the residue in joint tenancy said (1) : "The rule, that a devise to two or more persons simply makes them joint tenants, is not founded upon any peculiarity of the law of real property in England, but is applicable to personal property ; and there is, apparently, nothing in Hindu law or the nature of Hindu property to prevent its application to a Hindu will." But in *Jogeswar Narain Deo v. Ram Chand Dutt* (2) the Privy Council, in commenting on the decision in *Vydnada v. Nagammal*, (3) said : "It appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family." In referring to this judgment, Farran, C. J., (4) said : "what in my opinion they held in addition to construing the will before them was (5) that the rule of English law (which their Lordships term an

(1) *Ib.* ; at p. 574. See *Jairam v. Kuber-bai* (1885), 9 Bom., 491 at p. 509.

(2) (1896) 23 I. A., 37 at p. 44 ; 23 Cal., 670, at p. 679.

(3) (1888) 11 Mad., 258.

(4) *Navroji v. Perozbai* (1898) 23 Bom., 80 at p. 99.

(5) Jairam., 5th Ed., 310 ; Williams, 10th Ed., Vol. I, p. 963 ; Succession Act s. 93.

extremely technical rule of English conveyancing), that a joint tenant's interest does not descend upon his heirs, is not properly applied to a bequest in joint tenancy under a Hindu will." Again, in *Bhobatarini Debya v. Peary Lall Sanyal* (1), Banerjee and Rampini, JJ., said : "where any property is bequeathed to two or more persons without any specification of shares, the natural presumption is that they are intended to take in equal shares ; and where the estate bequeathed is one of inheritance, it is far more reasonable to suppose that each legatee and his heirs are the object of the testator's bounty, than that he intends that the legatee should take by survivorship, and the heirs of the last surviving legatee should take the whole. We may observe that even in English law the leaning has been in favour of tenancy in common ; and the Court, as Lord Thurlow remarked in *Joliffe v. East*, (2) decrees a tenancy in common as much as it can."

Of course, Rule 21 applies where a tenancy in common is created. It may be stated generally, that all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality will create a tenancy-in-common. Thus, it has been long settled that the words "equally

(1) (1897) 24 Cal., 646 at p. 653 ; 1 C. W. N. 578 at pp. 587, 588. But it was held there that s. 93 of the Success-

sion Act did not touch the question before the Court.

(2) (1789) 3 Bro. C. C. 25 at p. 26

to be divided" or "to be divided" will have this effect; and so, of course, will a direction that the subject of gift shall "be distributed in joint and equal proportions." (1)

(d) Bequests to any child or other lineal descendant of the testator who dies in the lifetime of the testator but leaves a lineal descendant who survives the testator. In these cases the death of the legatee is treated as having happened immediately after the death of the testator, unless a contrary intention appear by the will. (2) And in applying section 96 of the Succession Act to Hindu wills, Tottenham and Bannerjee, J.J., in *Jitu Lal Mahta v Binda Bibi*, (3) held as follows: "In the present case the mode in which the bequest to Jodha Bibi has been construed by the Court below and has to be construed under the provisions of section 96 of the Indian Succession Act, is one that comes, in our opinion, within the rule in the *Tagore case* (4) which is laid down in these terms: 'A person capable of taking under a will, must, either in fact or in contemplation of law, be in existence at the death of the testator.' Now, Jodha Bibi was, in the contemplation of law as provided in section 96, a person in existence at the time of the testator's death, because a lineal descendant

(1) *Jarnani*, 5th Ed., Vol. II, p. 1121; *Hirabai v. Lakshminbai* (1887), 11 Bom., 573, 579; *Rewun Persad v. Mussamat Radha Beby* (1846), 4 M. I. A., 137.

(2) Succession Act, s. 96. As to what is included in the word "child," see ss. 86

of Succession Act and 6 of the Hindu Wills Act (XXI of 1870).

(3) (1889) 16 Cal., 549 at p. 555.

(4) (1872) 9 B. L. R., 377 at p. 400; I. A. Sup., Vol. 47 at p. 70.

of hers survived the testator. That being so, we do not think that by giving effect to this bequest, the rule in the *Tagore case* is in any way contravened.

"It was urged that when that rule speaks of a person being in existence in the contemplation of the law, the law referred to must be taken to be Hindu law." We do not think that that is so, for the judgment in the *Tagore case* we find that their Lordships, when speaking of a person in embryo as being a person in existence, referred to general principles of jurisdiction for coming to that conclusion and not to any specific rule of Hindu law."

Section 96 of the Succession Act is practically the same as s. 33 of the Wills Act in England. (1) Now, the policy of the Act, and the objects it was intended to accomplish are...sufficiently manifest. It was intended to prevent a portion given by a testator to a child going from the estate of such child, and his family being left portionless, by reason only of the death of the child under certain circumstances --- a consequence of law which the common feelings of mankind declared to be a disappointment of the intention of the father. (2) The effect of the section is to prolong the original donee's life by a fiction for a particular purpose; that purpose is to give effect to the will in which the gift which would otherwise lapse occurs, and it only points out the

(1) 1 Vic., c. 26, XXXIII. And be it further, enacted that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at

the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

(2) *Per Wigram, V. C., Winter v. Winter* (1846), 5 H. & C. 306, at p. 313.

mode in which that effect is given. Thus the subject of gift devolves with any obligation to which, under the will, it would have been subject in the hands of the deceased donee if he had actually survived; as an obligation to compensate other legatees under the same will, disappointed by his assertion of rights that defeat their legacies. (1)

The words of the section point at no particular period of death within the testator's lifetime. The words "shall die" speak from the death of the testator; and there are no words to refer the futurity of the word "shall" to the date of the will. The words of the clause mean that any gift to any child, though not living at the testator's death, is within its operation and therefore apply to a child who dies previously to the date of the will. (2) To prevent the lapse of a legacy to a legatee, being a child or other issue, who may die in the lifetime of the testator, it is not necessary that the issue of the legatee who is alive at the death of the testator should be the same issue who was alive at the death of the legatee; it is sufficient that any issue — e.g., a grandchild of the legatee — should be in existence at the death of the testator. (3) Such a legacy is a vested interest in the legatee, and passes to his representatives or under his will, as the case may be, and not to the issue, whose existence prevents the lapse. (4)

(1) *Jarm.*, 5th. Ed., Vol. I, p. 324; *Pickersgill v. Rodger* (1876), 5 Ch. D., 163.

(2) *Per Stuart, V. C., Wisden v. Wisden* (1854), 2 Sm. & G., 396 at p. 405:

see *In re Scott* (1901), 1 K. B., 228, 237.

(3) *In the Goods of Jane Parker* (1860), 1 Sw. and T., 523.

(4) *Ib.*; *Johnson v. Johnson* (1843), 3 H. & C., 157.

LECTURE X.

Rule 22. If a legacy be given in general terms without specifying the time when it is to be given the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives.(1)

THE law is said to favour the vesting of estates ; the effect of which principle seems to be that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person *in esse* simply (i.e., without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest.

If words of futurity are introduced into the gift the question arises whether the expressions are inserted for the purpose of postponing the vesting or point merely to the deferred possession or enjoyment.(2)

It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words

(1) Succession Act, s. 91. It is true that the word "paid" is used in that section, but the more general word "given" is used in the Rule for the

reasons explained after.

(2) Jarman, 5th Ed., 756; *Kewun Persad v. Mussamul Radha Beeby* (1846), 4 M. I. A., 137, 176.

descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands to *A* for life, and after his decease to *B* in fee, the respective estates of *A* and *B* (between whom the entire fee simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devises being, that the estate of the one is in possession, and that of the other is in remainder.(1)

In consideration of these circumstances, the judges from the earliest times were always inclined to decide, that estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession. To accomplish this purpose, a distinction has been made between the adverbs *if* and *when*, to which the learned in our language, not of the profession of the law, would perhaps not agree; upon this distinction, however, many equitable arrangements of property have been made; upon this distinction the titles of many estates depend, and it will therefore be the duty of the judges to observe it.(2)

(1) *Jarman*, 5th Ed., 756, 757.

(2) *Per Best, C. J., Duffield v. Duffield*

(1829), 3 Bl. N. S., 260 at p. 331; *s.c.*, 1

D. and Cl., 268 at pp. 311, 312.

Although the words "to be paid" are used in section 91 of the Indian Succession Act which at first sight would appear to confine the principle underlying that section to pecuniary legacies, it seems clear that this section read with section 106 of the Act extends the principle to all legacies whatever their character may be.

Rule 23. **Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed a right to receive it at the proper time, shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death.** (1)

The second part of section 106 of the Succession Act which provides that where the legatee dies before the time he is entitled to receive the legacy and without having received it, it shall pass to his representatives, is the natural and legal consequence where the legacy has once become vested in interest. This section further provides that an intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that if a particular event shall happen, the legacy shall go over to another person. (2)

Estates and interests in property are of four kinds : (i) vested in possession, that is, when there is a present right to the immediate possession and enjoyment ; (ii) vested in interest but not in possession where there is

(1) Succession Act, s. 106.

Bachman (1884), 6 All., 583; *Maseyk v.*

(2) See also s. 19 of the Transfer of Property Act (IV of 1882) ; *Bachman v.*

Fergusson (1878), 4 Cal., 304.

a present indefeasible right to the future possession or enjoyment; (iii) contingent; and (iv) conditional. A legacy may, however, be vested either in possession or interest, but subject to being divested on the happening or non-happening of a specified uncertain event.(1) But in such cases an estate once vested will not be divested unless all the events which are to precede the vesting of a substituted devise happen. And this, it is to be observed, applies as well in regard to events which respect the personal qualification of the substituted devisee, as those which are collateral to him. In every case the original devise remains in force, until the title of the substituted devisee is complete. Thus, if a devise be made to *A* to be divested on a given event in favour of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift come *in esse*, and answer the qualification which the testator has annexed thereto.(2) Thus, where a sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor living at the death of *C* and both *A* and *B* die before *C* the original gift to *A* and *B* is not defeated, and the representative of *A* takes one-half the bequest and the representative of *B* the other half.(3) Again, a gift to a person for life and after his death to his three children, or such of them as should be living at the time of his death was held to confer a vested interest on the children subject to be divested only in favour of those who should be living at the prescribed period; so that if all the children died in the lifetime of the tenant for life, the

(1) Succession Act, s. 118.

(2) Jarm., 5th Ed., 784, Succession Act, s. 119.

(3) Succession Act, s. 118, ill. (d); *Harrison v. Foreman* (1800), 5 Ves. Jun., 207.

shares of the whole devolved to their respective representatives.(1) As far as Hindus are concerned, the substituted devisee must be in existence at the testator's death.(2)

If the ulterior bequest is not valid, the original bequest is not affected by it,(3) and where no time is fixed for the happening of the specified uncertain event, such event must take place before the period of distribution in order to defeat the prior devise.(4)

An intention that a gift is not to become vested in interest may be shown by making it contingent upon the happening of a specified uncertain event in which case the legacy does not vest until that event happens or upon the non-happening of a specified uncertain event, in which case the legacy does not vest until the happening of that event becomes impossible;(5) but here, again, if no time has been fixed for the happening of the specified uncertain event, the legacy cannot take effect unless that event happens before the period of distribution. The difference between an estate vested but liable to be divested upon the happening of a

(1) *Jarm.*, 5th Ed., 785; *Sturges v. Pearson* (1819), 4 Mad., 411. Succession Act, s. 118, ill. (e); but see *In re Clark's Trusts* (1870), L. R., 9 Eq., 378.

(2) For cases dealing with the divesting of gifts as far as Hindu Law is concerned, see *Sorjumoney Dassee v. Dinobundhoo Mullick* (1858), 6 M. I. A., 526; 4 W. R. P. C., 114; *Bissonauth Chunder v. Sreemutty Bama Soonlary Dassee* (1867), 12 M. I. A., 41, S. C. subnom *Prankristo Chunder v. Bama Soonlary Dassee*, 9 W. R. P. C., 1; *Tagore v. Tagore* (1872), 9 B. L. R., 377; I. A. Sup. Vol. 47; 18 W. R. C. R., 359; *Ram Lall Mookerjee v. Secretary of State* (1881), 81. A., 46; 7 Cal., 304; 10 C. L. R., 349; *Kumar Tarakeswar Roy v. Kumar Shosha Shikhareswar* (1883), 10 I. A., 51; 9 Cal., 952; 13 C. L. R., 62; *Raikishori Dasi*

v. *Debindro Nath Sircar* (1887), 15 I. A., 37; 15 Cal., 409; *Sreemutty Kristoromoney Dassee v. Maharaja Narendro Krishna* (1888), 16 I. A., 29; 16 Cal., 383.

(3) Succession Act, s. 120; *Lalit Mohun Singh Roy v. Chukkun Lall Roy* (1897), 24 I. A., 26; 24 Cal., 834; *Anandrao Vinayak v. Admr.-General* (1895), 20 Bom., 450. See *Cartwright v. Cartwright* (1853), 3 DeG. M. & G., 982.

(4) Succession Act, s. 111. *Narendra Nath Sirkar v. Kamulbasini Dasi* (1896), 23 I. A., 18; 23 Cal., 563. See *Tarachurn Chatterjee v. Surash Chunder Mookerjee* (1889), 16 I. A., 166; 17 Cal., 122; *Mohur Mookerjee v. Kasiswar Mookerjee* (1897), 3 C. W. N., 478; *Ellokase Dassee v. Durpnargin Bysack* (1879), 5 Cal., 59.

(5) Succession Act, s. 107.

specified event and a contingent estate is that the legatee to whom the former estate is bequeathed has a right to the rents and profits of the bequest if there has been no prior devise in respect thereof during the term of suspense while the devisee of a contingent bequest has no interest whatever in it until it actually vests in him.(1)

Apart from the question of vesting a bequest may, in giving a beneficial interest, couple with it an obligation in which case the devisee, if he accepts it at all, must take it saddled with the obligation.(2) But where there are two separate bequests made to the same devisee, one of which is purely beneficial and the other is onerous, he is entitled to accept the purely beneficial one and reject the onerous bequest.(3)

Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, he cannot take such an interest until he fulfils the condition, but it is sufficient if he substantially complies with the condition.(4) There is, however, a peculiarity belonging to those conditions when the legacies are the subjects, which makes the rules of common law inapplicable to them in every instance. This anomaly is produced from the adoption of the civil law in the construction of personal bequests to a certain extent, according to which, where the condition is precedent, it is considered to be performed within the meaning of the testator if executed *cy près* when the whole cannot be literally fulfilled from unavoidable circumstances. The principle is the presumption of the testator not requiring the performance of impossibilities, and that his intention will be substantially carried into

(1) *Henderson, Intestate and Testamentary Succession*, 2nd Ed., p. 111 (n).
See *Duffield v. Duffield* (1829), 3 Bligh., N. S., 330.

(2) *Succession Act*, s. 109. .
(3) *Ib.*, s. 110.
(4) *Ib.*, s. 115. .

effect by permitting it to be executed as far as it can be done.(1) So where a testator bequeathed a fund to trustees upon trust, after the determination of a life-interest, to pay and transfer the trust-property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents and at the death of the tenant for life, the testator's sister was a widow and had two daughters, the elder of whom afterwards married while under age with the consent of her mother, it was held that the consent mentioned in the will must be taken to be that of the parents or parent if any, and that the daughter who had married with the consent of her surviving parent took a vested interest in the fund.(2) Again, where the bequest is conditional upon the devisee marrying with the consent of a certain person or persons, this condition is complied with if the devisee's first marriage takes place with such consent and does not extend to a second marriage.(3)

If, however, the bequest depends upon an impossible condition,(4) or one contrary to law or morality, it is void.(5)

Rule 24. When a legacy is bequeathed absolutely to, or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the legacy as if the will had contained no such direction.(6)

The word "fund" is used in section 125 of the Succession Act, but it is submitted that the rule embodied in that

(1) *Roper on Legacies*, 4th Ed., Vol. I, 802; cited *Dawson v. Oliver Massey* (1876), L. R., 2 Ch. D., 753, 758.

(2) *Dawson v. Oliver Massey* (1876), L. R., 2 Ch. D., 753, 758. Succession Act, s. 115, ill. (b).

(3) *Hutchison v. Hammond* (1790), 3 Bro. C. C., 127.

(4) Succession Act, s. 113.

(5) *Ib.*, s. 114.

(6) *Ib.*, s. 125. See ss. 10 and 11 of the Transfer of Property Act.

section applies equally to all classes of legacies.(1) Where the purpose of the gift is the benefit solely of the donee himself, he can claim the gift without applying it to the purpose and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring,(2) or a life-annuity,(3) or a house,(4) or to set him up in business,(5) or for his maintenance and education,(6) or to bind him apprentice,(7) or towards the printing of a book, the profits on which are to be for his benefit,(8) the legatee may claim the money without applying it or binding himself to apply it to the specified purpose; and even in spite of an express declaration by the testator, that he shall not be permitted to receive the money.....

These cases rest on the principle that the Court will not compel that to be done which the legatee may undo the next moment as by selling the thing to be purchased or giving up the business.(9) Thus a bequest of money to be laid out in planting trees on an estate of which the testator was tenant for life was held to be primarily for the benefit of the owners for the time being and to belong to persons entitled to the estate absolutely.(10) Where a testator left a legacy to his wife in the following terms "Rs. 2,000 to be credited in our shop in the name of my wife Bai Bapi. Interest at 6 per cent. to be paid to her every year. If in her

(1) *Mokoondo Lall Shaw v. Gonesh Chunder Shaw* (1875), 1 Cal., 101. See *Anantha v. Nagamuthu* (1881), 4 Mad., 200; *Tagore v. Tagore* (1872), I. A., Sup. Vol. 65; 9 B. L. R., 395; 18 W. R. P. C., 365.

(2) See *Apruce v. Apruce* (1813), 1 V. & B., 364.

(3) *Ford v. Barley* (1853), 17 Beav., 303.

(4) *Knox v. Lord Hotham* (1845), 15 Sim., 82.

(5) *Gough v. Bult* (1847), 16 Sim., 45, 54.

(6) *Webb v. Kelley* (1839), 9 Sim., 469, 472.

(7) *Barlow v. Grant* (1684), 1 Vern., 255.

(8) *Re Skinner's Trusts* (1860), 1 J. & H., 102, 105.

(9) *Jarman*, 5th Ed., Vol. I, 367, 368; *Stokes v. Chuk* (1860), 28 Beav., 610, 621.

(10) *In re Boies* (1896), 1 Ch., 507.

lifetime she demands the money to use in a good work, it should be given to her, but if she has not taken it in her lifetime, Jamnadas and Bhagirbhai are to dispose of it according to their own pleasure after death," it was held that this bequest came within the provisions of section 125 of the Succession Act and that the widow was entitled absolutely to the sum in question.(1) Where a testator gave his plantations in Assam and all his other estate to the plaintiff absolutely subject to the payment of his debts, and, after appointing her executrix continued, "on any sale by the plaintiff of the said plantations I will and direct her to pay my brother the sum of £1,000 out of the proceeds of such sale, also the further sum of £500 out of the proceeds of such sale" to the testator's sister, it was held that the direction to pay these legacies imposed no obligation on the plaintiff to sell; and further, that this direction was repugnant and void, and that the property, therefore, belonged to the plaintiff absolutely.(2) Following the principle laid down in this rule it has been held that if a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails.(3)

The doctrine regarding Precatory Trusts appears to have undergone a considerable change. As laid down in such cases as *Malim v. Keighly*(4) and *Knight v. Knight*(5) the rule of construction might shortly

(1) *Bai Bapi v. Jamnadas* (1897), 22 Bom., 774.

(2) *In re Elliott* (1896), 2 Ch., 353.

(3) *Lassence v. Tiernay* (1849), 1 Mac. & G., 551, 561; *The Administrator-General v. Apcar* (1878), 3 Cal., 553, 556.

(4) (1794) 2 Ves., 333, 335, 529.

(5) (1840) 3 Beav., 148, 172; *Administrator-General v. Lazar* (1879), 4 Mad., 244, 246, 247. See *Grendharas v. Nundokisore* (1867), 11 M. I. A., 405, 428; 8 W. R., P. C., 25, 26.

be stated thus: If a gift *prima facie* absolute is accompanied by a desire, wish, recommendation, or hope that the donee shall use it in a certain way, a precatory trust attaches to it unless a contrary intention can be shown. The rule as laid down in such cases as *Hill v. Hill*(1) and *Re Hamilton Trench v. Hamilton*(2) might, with tolerable accuracy, be stated in precisely the opposite terms, namely: If a gift *prima facie* absolute is accompanied by a desire, wish, recommendation, or hope that the donee shall use it in a certain way, a precatory trust shall not attach to it unless a contrary intention can be shown. In other words, the burden of proof is now, in spite of the use by the donor of such words, on the side of the person who alleges the trust. These words are to be taken into consideration to some extent in deciding whether or not there is a trust but unless they are helped by the context, no trust will attach.(3)

If a testator gives a residuary legatee directions which have the effect of diminishing the residue, and he accepts them either expressly or by silence, a trust will be fixed upon him to carry them out.(4) Again, where a gift is made in absolute terms, but the testator before or after the date of his will communicates to the legatees his intention, that they are to hold the gift in trust, and they either accept the trust or acquiesce

(1) (1897) 1 Q. B., 483.

(2) (1895) 2 Ch., 370.

(3) Underhill and Strahan, Interpretation of Wills and Settlements, p. 135; *Lambe v. Eames* (1871) L. R., 6 Ch., 597; *Stead v. Mellor* (1877), 6 Ch. D., 225. *In re Hutchinson and Tenant* (1878), 8 Ch. D., 540; *In re Adams and Kensington Vestry* (1884), 27 Ch. D., 394; *In re Diggles* (1888), 39 Ch. D., 253; *In re Hamilton* (1895), 2 Ch., 370; *In re*

Williams (1897), 2 Ch., 12; *Hill v. Hill* (1897), 1 Q. B., 483; *Richards v. Jones* (1898), 1 Ch., 438; *In re Hanbury* (1904), 1 Ch., 415; *In re Oldfield* (1904), 1 Ch., 549; See *Mussoorie Bank v. Raynor* (1882), 9 I. A., 70, 79; 4 All., 500, 510; *Nathu v. Dhumbhaiji* (1898), 23 Bom., 1.

(4) Theobold, 7th Ed. 73; *Byrn v. Godfrey* (1798), 4 Ves., 5, 10; *In re Applebee* (1891), 3 Ch., 422, 431.

in it by silence, evidence of the trust is admissible ; and if the evidence establishes the trust, effect will be given to it if it is valid ; if it is not, the property will go to the heir or next-of-kin as the case may be.(1) But the intention to create a trust must be clearly established.(2)

Sections 99 to 105 of the Indian Succession Act deal with void bequests, but of these, sections 104 and 105 have been expressly excluded from applying to Hindu wills by the Hindu Wills Act(3) and the decision in *Alangammonjori Debi v. Sonamoni Debi*(4) has the effect of excluding the explanation to section 99 and sections 100 and 101 from applying to Hindu wills. It was held in that case (a) that the law was clear that prior to the passing of the Hindu Wills Act a gift by will to a person unborn at the time when the testator died was void ; (b) that the Hindu Wills Act does not disclose any intention in the Legislature to extend the testamentary power of Hindus ; (c) that the words "to create in property an interest" in the fifth proviso to section 3 of the Act apply both to the quantity and the quality of the interest created and in their natural and ordinary meaning include the capacity of a donee to take, so that a Hindu testator may be said to create an interest in property which he could not have previously created when he makes a gift to a person unborn at the date of his death ; and (d) that the object of the five provisos enacted by section 3 is to prevent, so far as Hindus are concerned, the wholesale application, as it were, of the sections and chapters mentioned in section 2 from directly or indirectly altering or affecting the

(1) *Theobold*, 7th Ed., 73 ; *Moss v. Cooper* (1851), 1 J. and H., 352.

(2) *Theobold*, 7th Ed., p. 74 ; *Wallgrave v. Tebbs* (1855), 2 K. and J., 313 ; *Jones v. Badley* (1868), L. R., 3 Ch., 362.

In re Pitt Rivers (1902), 1 Ch., 403 ; *Kali Charan Ghosal v. Ram Chandra Mandal* (1903), 30 Cal., 782.

(3) Act XXI of 1870.

(4) (1882) 8 Cal., 637.

Hindu Law in those matters to which the provisos relate, and from thus introducing changes not contemplated by the Legislature. In *Ram Lall Sett v. Kanai Lall Sett*(1) Wilson, J., was of opinion that section 102 of the Succession Act also had no application.

Sections 99 to 105 of the Succession Act have also been excluded from applying to the wills of persons governed by the Oudh Estates Act.(2)

The object of sections 99 to 104 is mainly to guard against perpetuities. In *Cattlin v. Brown*(3) Wood, V.C., laid down the following rules: "The first rule is, that an executory devise is bad unless it be clear, at the death of the testator, that it must of necessity vest in some one, if at all, within a life in being and twenty-one years after.(4)

"The second rule is, that you must ascertain the objects of the testator's bounty, by construing his will without any reference to the rules of law which prohibit remote limitations; and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained.

"Thirdly, if the devise be to a single person answering a given description at a time beyond the limits

(1) (1886) 12 Cal., 663 at p. 669. See Transfer of Property Act (IV of 1882), s. 15; *Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry* (1882), 8 Cal., 390; 10 C. L. R., 215; *Jairam v. Kuverbai* (1885), 9 Bom., 506. See also the remarks of the Privy Council in *Rai Bishan Chand v. Mussamut Asnaida Koer* (1884), 11 I. A., 164 at p. 177; 6 All., 560, 572.

(2) Act I of 1869.

(3) (1853) 11 Hare, 372 at pp. 375—377. See *Krishnaromoni Dasi v.*

Ananda Krishna Bose (1869), 4 B. L. R., O. C., 231.

(4) S. 101 of the Succession Act, however, still further limits the period of vesting, for it provides that the vesting can only be delayed beyond the lifetime of one or more persons living at the testator's decease and for the period only of the minority of some person in existence at the expiration of that period, and s. 3 of the Act limits the period of minority to 18 years of age.

allowed by law, or to a series of single individuals answering a given description, and any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding the others. . . . (1)

“The fourth rule is, that where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule, and for the same reason. You cannot give the whole property to those who are in fact ascertained within the period, and might have taken if the gift had been made to them by nomination, because they were intended to take in shares to be regulated in amount, augmented or diminished, according to the number of the other members of the class, and not to take exclusively of those other members.(2)

“The fifth and last rule to which I need to advert, is this, that where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law.”

The question is not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it was not, it cannot be made so.(3) When a gift is infected with the vice of

(1) Succession Act, s. 102.

(2) *Ib.*, s. 102, *ills.* (a) and (b).

(3) *Per Lord Kenyon, M. R.*, in *Jee v. Andley* (1787), 1 Cox., 324, 326.

its possibly exceeding the prescribed limit, it is at once and altogether void, both at law and in equity, and even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event, which would have taken it beyond the boundary, had occurred.(1) An executory devise to be valid must be so framed that the estate devised *must* vest, if at all, within a life or lives in being and twenty-one years after ; it is not sufficient that it *may* vest within that period ; it must be good in its creation ; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years, and the period allowed for gestation, it is not valid, and subsequent events cannot make it so.(2) The reason why a gift to a class, as children or the like, is void when it may embrace some objects too remote, is this : There is no intention to give to any number short of the whole class ; and therefore, if the prescribed limit *may* be transgressed before the class is filled up, the whole gift fails, because it does not necessarily take effect within the prescribed period. The ground on which the gift fails is the want of certainty that the bequest will take effect within the prescribed period ; and whether such uncertainty arises from the possibility of the birth of further children or from any other cause seems on principle immaterial.(3)

Where a devise is void for remoteness, all limitations ulterior to, or expectant on, such remote devise are also void, though the object of the prior devise should never come into existence.(4) But care should be taken to distinguish between this class of cases and those in

(1) *Lord Dungannon v. Smith* (1846), 12 Cl. & F., 546, *per* Platt, B., at p. 562.

(2) *Ib.*, *per* Cresswell, J., at p. 563.

(3) *Ib.*, *per* Rolfe, B., at p. 575, as

regards the period of twenty-one years,
see note (4), p. 175.

(4) *Jarman*, 5th Ed., 253 ; Succession
Act, s. 103.

which the gift over is to arise on an *alternative* event, one branch of which is within, and the other is *not* within, the prescribed limits; so that the gift over will be valid or not according to the event.(1) Where a devise over includes two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may be divided though included in one expression.(2)

A recital in a will showing that the testator contemplated establishing a perpetuity such as the law does not allow does not invalidate subsequent trusts in the will so far as those trusts, or any of them, are such as the law allows.(3)

Section 104 restricts the power of accumulation far more than the English law does. The law in England(4) does not allow the testator to direct income to accumulate for a longer period than twenty-one years after his death or during the minority or respective minorities of any person or persons who shall be living or *en rentre sa mère* at the time of his death, or during the minority or respective minorities only of any person or persons who under the will would, for the time being if of full age, be entitled to the income directed to be accumulated. Section 104 only allows accumulation for a period of one year only, and that in two cases only—(a) where the income is derived from immoveable property; and (b) where the accumulation is directed to be made from the testator's death.

The object of section 105 is to prevent death-bed bequests to religious or charitable uses by a person having a nephew or niece or nearer relative, and thereby

(1) *Jarman*, 5th Ed., Vol. I, 255.

(2) *Per Wightman J.*, in *Evans v. Challis* (1859), 7 H. L. C., 531 (at p. 547).

(3) *Kally Prosunna Mitter v. Gope Nauth Kur* (1880), 7 C. L. R., 241.

(4) The Mission Act (39 & 40 Geo. III, c. 98).

acting unfairly or unjustly to such relative. Section 24 gives a table of consanguinity. Charity is not actually defined in the Succession Act, but the illustrations to section 105 show what is intended to be included in the term. Charity has been defined as a gift to a general public use, which extends to the poor as well as to the rich ;(1) and societies for the suppression and abolition of *vivisection* are charities within the legal definition of the term "charity."(2)

Sections 78, 79, 80, 81, 84, 86 and 87 of the Succession Act have not been made applicable to those governed by the Hindu Wills Act or the Oudh Estates Act. Section 78 deals with general powers, and follows closely section 27 of the English Wills Act.(3) A general power of appointment created after a will, but in the testator's lifetime, will be executed by the will if the will would have operated to execute the power had it been in existence at the date of the will, and consequently a general residuary devise or bequest will, unless a contrary intention appears by the will, operate as an execution of all general powers of appointment given to the testator without reference to the date of their creation.(4) But not of general powers of *revocation*. Even

(1) *Jones v. Williams* (1767), 2 Amb., 651.

(2) *In re Foveaux* (1895), 2 Ch., 501.

(3) 1 Vict., c. 26, § 27.—"A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary

intention shall appear by the will ; and, in like manner, a bequest of the personal estate of the testator, or any bequest of the personal estate described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will."

(4) Jarman, 5th Ed., Vol. I, p. 501 ; *Airny v. Bower* (1887), 12 Ap. Ca., 263.

where the will is made expressly in exercise of all powers of appointment, a power of revocation will not be thereby executed if the words of the will can be otherwise satisfied. If there were no power, but one of revocation and new appointment, it would be different.(1)

Section 79 is based upon the decision in *Brown v. Higgs*.(2) There Lord Eldon, L. C., remarked : (3) "It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, this Court cannot execute it. It is equally clear that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust." A gift to such member or members of a class as some person or persons may select, with no gift over on default of selection, will, in so far as the power of selection is not exercised, be construed to be a gift equally among all the members of the class in existence at the time the power should have been exercised.(4)

In sections 80, 81, 84, 86 and 87, the Legislature has laid down certain rules for the construction of gifts made to objects under particular designations, description of relationship, or of membership of a class, such rules being based on decisions of the English Courts. Under section 81 the representatives do not take beneficially, but hold it as part of the estate they represent. The additional words in section 84 are merely words of limitation, and not of purchase.

(1) *Jarman*, 301, 302.

(2) (1803) 8 Ves., 561.

(3) *Ib.*, at p. 570.

(4) *Underhill and Strahan*, p. 71.

LECTURE XI.

A STATUTE, or, as it is generally styled in British India, an Act, may be defined as an Edict of the Legislature, and Statute Law is the exposition by Courts of Justice of Edicts of the Legislature. It is the work of the Legislature to enact or declare what for the future shall be the law of the country while it rests solely with the Judges to interpret what is so expressed, and to give that law its full operation. To declare what the law is or has been is a judicial power ; to declare what the law shall be is legislative.(1) It is not for the Legislature to construe the law, even if the Courts may have mistaken its intention. The province of the Legislature is not to construe but to enact, and their opinion—not expressed in the form of law as a declaratory provision would be—is not binding on the Courts, whose duty is to expound the Statutes they have enacted ;(2) on the other hand, it is not for the Judges to alter the law, even if they see cause to doubt the wisdom or justice of any particular provision. The Judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words ;(3) to give a construction contrary to, or different from, that which the words import or can possibly import is not to

(1) *Ogden v. Blackledge*, 2 Cranch., 276.
(2) *Per Parke, B.—Russell v. Ledman*,

14 M. & W., 589 (1845).

(3) *Per Cresswell, J.—Biffen v. Yorke*
(1843), 6 Scott, N. R., 235.

interpret law, but to make it ; and Judges are to remember that their office is *jus dicere*, not *jus dare*.⁽¹⁾

The following are the principal classes of Statutes : (a) General and Special Statutes ; (b) Remedial and Penal Statutes ; (c) Statutes *in Pari Materia* ; and (d) Temporary Statutes.

General Acts affect either the whole community or large and important sections, the interests of which may be considered identical with those of the whole body. Special Acts include those which are called private, local or personal, as they relate to private interests, and deal with the affairs of persons, places, classes and other bodies which are not of a public character.⁽²⁾ The broad distinction between general and special Statutes is, that everybody is considered as assenting to the former, and they consequently bind the whole community, while the latter, as a rule, bind only those who are parties to them, or are interested in their subject-matter.⁽³⁾

Remedial Acts are such as supply some defect in the existing law, and redress some abuse or inconvenience with which it is found to be attended without introducing any provision of a penal character ; while Penal Acts are those which impose penalties and punishments for an offence committed.⁽⁴⁾

Statutes *in Pari Materia* consist of such Statutes as relate to the same subject, or to the same persons or

(1) Wilberforce's Statute Law, p. 9 : Maxwell, 4th Ed., pp. 7 & 8 ; *Buzloor Raheem v. Shumsoonissa Begum* (1867), 11 M. I. A., 604 : 8 W. R., P. C., 12 ; *Mohesh Chandra Dass v. Madhub Chundra Sirker* (1870), 13 W. R., 86.

(2) Wilberforce, p. 218. Instances of special Acts are the Presidency Banks

Act (XI of 1876), the Oudh Estates Act (I of 1869), and the Administrator-Generals Act (II of 1874 as amended by Acts IX of 1881 and V of 1902).

(3) Wilberforce, p. 220.

(4) Stephen's Commentaries, 8th Ed., Vol. I, 70.

things, such as the Stamp Acts, the Revenue Laws and the Statutes of Limitation.

Temporary Acts are those the duration of which is limited by the Legislature itself, and which expire without the necessity of actual repeal at the end of the time fixed for their continuance.(1)

Law, according to the celebrated division of Bentham, falls under the two great heads of substantive and adjective law. Substantive law defines the rights, duties and obligations of parties. Adjective law deals with procedure, the mode of proof and the means of securing redress. Substantive law comprises the law which the Courts are established to administer. Adjective law embraces the rules according to which the Substantive law is administered.(2)

A Statute is the will of the Legislature ; and the fundamental rule of interpretation to which all others are subordinate is, that a Statute is to be expounded "according to the intent of them that made it." The object of all interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. When the intention is expressed, the task is one of verbal construction only ; but, when the Statute expresses no intention on a question to which it gives rise, and yet some intention must necessarily be imputed to the Legislature regarding it, the interpreter has to determine it by inference grounded on certain legal proceedings.

(1) *Vide* the Indian Paper Currency Act (VIII of 1900).

(2) Brett's Commentaries on the present laws of England, Vol. I, p. 348.

This division is, however, • • • criticised by Austen.—See Austen's Jurisprudence, 1st Ed., Vol. I, pp. 451, *et seq.*

The subject of the interpretation of a Statute seems thus to fall under two general heads—first, what are the principles which govern the construction of the language of an Act of Parliament ; and next, what are those which guide the interpreter in gathering the intention on those incidental points on which the Legislature is necessarily presumed to have entertained one, but on which it has not expressed any.(1)

The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of His Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date when the Indian Councils Act (24 & 25 Vic., c. 67) received the royal assent (*i. e.*, August 1st, 1861), were under the dominion of Her Majesty. In the preamble to 28 & 29 Vic., c. 17, and in s. 1 of 32 & 33 Vic., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act. Even if that construction were erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of Legislature concerning the law does not make the law, yet it may be so declared as to operate in future.(2)

Rule 1. All legislation is *prima facie* territorial.

Primarily the legislation of a country is territorial. The general rule is, that *Extra territorium jus dicenti impune non paretur*; *leges extra territorium non obligant*.⁽³⁾ The laws of a nation apply to all its subjects, and to all things and acts within its territories,

(1) Maxwell, 4th Ed., pp. 1 and 2.

(2) *Abdulla v. Mohan Gir* (1889), 11 All., 490.

(3) Dig. 2, I. 2)—*Sirdar Gurdyal*

Singh v. Rajah of Faridkote (1894), 21 I. A., 185.

including, in this expression, not only its ports and waters, but its ships, whether armed or unarmed, and the ships of its subjects on the high seas or in foreign tidal waters, and foreign private ships within its ports. They apply also to all foreigners within its territories (not privileged like sovereigns and ambassadors) as regards criminal, police and, indeed, all other matters except some questions of personal status or capacity, in which, by the comity of nations, the law of their own country, or the *lex loci actus* or *contractus*, applies. This does not, indeed, comprise the whole of the legitimate jurisdiction of a State; for it has the right to impose its legislation on its subjects, natural or naturalised, in every part of the world, and, on such matters as personal status or capacity, it is understood always to do so; but, with that exception, in the absence of an intention clearly expressed or to be inferred, either from its language, or from the object or subject-matter or history of the enactment, the presumption is, that the Legislature does not design its Statutes to operate on them beyond the territorial limits of the State.(1)

Territorial jurisdiction attaches (with special exceptions) upon all persons, either permanently or temporarily, resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist

(1) Maxwell, pp. 211-213. For an instance of "an intention clearly expressed," see the Indian Penal Code (Act XLV of 1860) as amended by Act IV of 1898.

as to persons domiciled, or who, when living, were domiciled, within the territory.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentia* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is, by international law, an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced.(1) In *Girdar v. Kassigar* (2), the Bombay High Court held that the Small Cause Court in Bombay has jurisdiction to try a suit brought in that Court against a foreigner who does not reside in Bombay, but carries on business there through an agent, on the ground that, though a foreigner, that is a non-British subject, who does not personally carry on business within the territorial limits of the Court, does not make himself personally subject to the Municipal law of British India, still, by establishing his business in British India, from which business he expects to derive profit, he accepts the protection of the territorial authority for his business and his property resulting from it, and may be fully regarded as submitting to the Courts of the country. Both the Bombay and Madras High Courts have held that Article 12 of the Letters Patent of those High Courts is an instance of the special local legislation referred to in the judgment of the Privy Council in the *Faridkote case*, and that, whether the cause of action arises wholly within the local limits,

(1) *Sirdar Gurdyal Singh v. Rajah of Faridkote* (1894), 21 L. A., 185.

ruling *Kessowji v. Khimji* (1888), 12 Bom., 507.

(2) (1893) 17 Bom., 662, virtually over-

or where the cause of action arises in part within the local limits, and leave to institute the suit has been obtained, the Court has jurisdiction over a non-resident foreigner.(1)

Under the same general presumption that the Legislature does not intend to exceed its jurisdiction, every Statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law. If, therefore, it designs to effectuate any such object, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it ; for, if any other construction is possible, it would be adopted in order to avoid imputing such an intention to the Legislature. All general terms must be narrowed in construction to avoid it.(2)

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so is by looking to the terms of the instrument by which affirmatively the legislative powers were created, and by which, negatively, they are restricted. If what has

(1) *Ram Rarji v. Pralhadas* (1895), 20 Bom., 133 ; *Venkata Lutchmi v. Sri-rungaratnam* (1900), 11 M. L. J., 91.

See also *Rambhat v. Shankar* (1901), 25 Bom., 528.
(2) *Maxwell*, p. 218.

been done is legislation within the general scope of the affirmative words which give the power, and, if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions.(1)

Rule 2. A Statute ought to be so interpreted that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.(2)

The rules for the construction of Statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, *viz.*, that, if it is possible, the words of a Statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat.*(3) The general rule for the construction of Acts of Parliament is, that the words are to be read in their popular, natural and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction; because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense.(4) In construing an Act of Parliament, when the intention of the Legislature is not clear, we must adhere to the natural import of

(1) *R. v. Burah* (1878), 3 App. Cas., 889 (at pp. 904, 905); see *Bell v. The Municipal Commissioners* (1902), 25 Mad., 457, 479; *Hari v. Secretary of State* (1903), 27 Bom., 424.

(2) *Per Cockburn, C. J.—Queen v. Bishop of Oxford* (1879), L. R., 4

Q. B. D., 245 (at p. 261); *Mohur Sheikh v. Queen-Empress* (1893), 21 Calc., 392, 399.

(3) *Per Bowen, L. J.—Curtis v. Storin* (1889), 22 Q. B. D., 513 (at p. 517).

(4) *Per Byles, J.—Birk v. Allison* (1862), 13 C. B. C., N. S., 12 (at p. 23).

the words ; but, when it is clear what the Legislature intended, we are bound to give effect to it notwithstanding some apparent deficiency in the language used.(1) The rule of law.....upon the construction of all Statutesis, whether they be penal or remedial, to construe them according to the plain, literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity.(2) There is always some presumption in favour of the more simple and literal interpretation of the words of a Statute.(3) But the more literal construction ought not to prevail if it is opposed to the intentions of Legislature as apparent by the Statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.(4) We are bound to look at the language used in the Act, construing it with reference to the object with respect to which the Legislature has used that language, but construing it in its ordinary grammatical sense, unless there is something in the subject-matter or the context to show that it is to be understood in some other sense, and, doing all this, we are to say what is the intention of the Legislature expressed by that language.(5)

It must also be assumed that words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not.(6)

(1) *Per Pollock, C. B.—Huxham v. Wheeler* (1864), 3 H. & C., 73 (at p. 80).

(2) *Per Alderson, B.—Att.-Gen. v. Luckwood* (1842), 9 M. & W., 378 (at p. 398).

(3) *Per Selborne, L. C.—Caledonian Railway Co. v. North British* (1881), 6 L. R., App. Cas., 114 (at p. 121).

(4) *Ib.*, p. 122.

(5) *Per Blackburn, J.—Eastern Counties v. Marriage* (1860), 8 H. L. C., 32 (at p. 36); *Bamasoondaree v. Verner* (1874), 13 B. L. R., 193, 194; *Queen-Empress v. Balkrishna* (1893), 17 Bom., 573.

(6) *Maxwell*, 4th Ed., p. 2.

Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular Statute in which they are used, the rule of construction of Statutes requires that the words used in such Statute should be construed according to the sense in which they have been so previously used although that sense may vary from the strict literal meaning of the words.

The words in the Statute of Limitations (21 Jac. I, c. 16, s. 7)—“beyond the seas”—are synonymous, in legal import, with the words “out of the realm,” or “out of the land,” or “out of the territories,” and are not to be construed literally.(1)

Rule 3. When the language is plain and unambiguous, and admits of one meaning only, that meaning, and that meaning alone, must be given to it.

When the language is not only plain, but admits but of one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absoluta Sententia expositione non eget.* Such language best declares, without more, the intention of the lawgiver, and is decisive of it. The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It matters not, in such a case, what the consequences may be. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced even though it be absurd or mischievous. If the words go beyond what was

(1) *Ruckmaboye v. Lulloobhoy* (1852), 5. M. I. A., 234. For “certain words and expressions used in Statutes which

have been judicially or statutably explained,” see *Craig’s Statutes Law, Appendix A*, p. 477.

probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect. When once the intention is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands according to the real sense of the words.(1)

In short, when the words admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature, and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is unambiguous itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the Statute; it is to expound it. The question for him is not what the Legislature meant, but what its language means; what it has said it meant. To give a construction contrary to, or different from, that which the words import or can possibly import is not to interpret the law, but to make it.(2)

“If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where

(1) Maxwell, 4th Ed., pp. 4 & 5.

(2) *Ib.*, p. 7.

their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." (1)

If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reason for enacting it. (2)

In determining either what was the general object of the Legislature or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, justice and legal principles should, in all cases open to doubt, be presumed to be the true one. An agreement drawn from an inconvenience, it has been said, is forcible in law ; and no less force is due to any drawn from an absurdity or injustice. But a Court of Law has nothing to do with the reasonableness or unreasonableness of a statutory provision except so far as it may help it in interpreting what the Legislature has said. (3)

Moreover, the intention of the Legislature must be ascertained from the words of a Statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the Statute. (4)

A practice which is in contravention of the law, even if such practice be the practice of the High Court,

(1) *Per Jervis, C. J.—Abley v. Dal* (1851), 11 C. B., at p. 391 ; *Guribullah v. Mohun Lall* (1881), 7 Cal., 127.

(2) *Buloor Raheem v. Shamsoonissa* (1867), 11 M. I. A., 604.

(3) *Maxwell*, p. 285 ; *per Lord Hals-*

bury, Cooke v. Vogeler (1901), A. G., 107.

(4) *Fordyce v. Bridges* (1847), 1 H. L. C., 1, *per Lord Brougham*, p. 4 ; s. c. 11 Jur., 157 ; *Nanak Lall v. Mehin Lall* (1877), 1 All., 487 (496).

cannot make lawful that which is unlawful : nor can a practice of a Court justify a Court in putting upon an Act of the Legislature a construction which is contrary to the plain wording of the Act.(1) We cannot allow any question of hardship to influence us in applying the principles of construction to Acts of the Legislature where the wording of those Acts is plain and unambiguous. We are not responsible for those Acts, and to put upon those Acts a construction different from that, which according to the principles of construction, upon which a Court of Justice must act, they bear, would be to depart from our duty as judges and to arrogate to ourselves the powers and functions of the Legislature. We have to construe the Acts of Legislature as we find them, whether we approve of them or not,—not to alter or amend them.(2)

But in applying Rule 3 the following exception must be borne in mind :

Exception to Rule 3.—A case within the letter is not within the meaning of a Statute if it is not within the intention of the Legislature, and a case not within the letter is within the meaning of the Statute if it is within the intention of the Legislature.

Statutes are to be construed not according to their mere letter, but the intent and object with which they were made. It occasionally happens therefore that the judges who expound them are obliged, in favour of the intention, to depart in some measure from the words. And this may be either by holding that a case within the words, is not within the meaning ; or that a case not within the words, is within the meaning. Thus where a Statute provides that all who shall commit a certain act

(1) *Per Edge, C. J., Balkaran v. Gobind* (1890), 12 All., 129 at p. 135. (2) *Ib.*, p. 137.

shall be deemed felons, yet a mad man who does the act shall not be deemed a felon ; for that would be contrary to the presumable intention. And so, on the other hand, where an Act of Parliament gave the owners of inheritances a remedy by action against such tenants holding for life or *years* as should commit waste (*i.e.*, spoil and destruction) ; the action was held maintainable against a tenant holding only for one year or less, for so the law-makers presumably designed. In all instances where the strict letter of the law is thus corrected by reference to its intention, the construction is said to be by *equity* a phrase not peculiar to the law of England, but used by foreign jurists in the same sense. Thus, in the first example, the case would be said to be out of the equity of the act ; in the second to be within its equity. It is to be observed, however, that this principle of equitable construction is not to be carried beyond certain bounds, and a judge is not at liberty, in favour of a supposed intention, to disregard the express letter of the Statute, where, for anything that appears, the wording may correspond with the actual design of the Legislature—the maxim in cases of this description being that *a verbis legis non recedendum est*. It is also important to remark, that the rule in question has been applied more freely to the antient Statutes than it now is to those of more modern date, which are interpreted somewhat more strictly, and with closer adherence to the letter. For the style of framing Acts of Parliament has itself undergone a material change—those of a more antient era being comparatively short and general in their character, while the latter Acts are expanded into minute detail and intended to reach every specific case ; and, therefore, in adopting a construction not in strict conformity with the language of the Legislature,

there is more danger, than there once was, of going beyond, or following short of, its real intention.(1)

The term equity, as it is here employed, is said by Lord Mansfield to be synonymous with the meaning of the Legislature(2) and according to Byles, J., "within the equity" is equivalent to "within the mischief." (3) "Equity" says Lord Coke, "is a construction made by the Judges that cases out of the letter of a Statute yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the Statute provideth, and the reason hereof is for that the law-makers could not possibly set down all cases in express terms. (4)

An instance of this exception is the way defamatory statements are treated when made in the witness-box. They are held not come within the meaning of the penalty for defamation as provided in the Penal Code. (5)

Rule 4. Words in a Statute are to be read with reference to the subject-matter they refer to and are controlled by the context.

No Court is entitled to depart from the intention of the Legislature as appearing from the words of the Act, because it is thought unreasonable. But when two constructions are open, the Court may adopt the more reasonable of the two.(6) It is a general rule of construction of Statutes that, unless you are obliged to

(1) Steph. Bl., 8th Ed., Vol. I, pp. 72, 73.

(2) *The King v. Williams* (1757), 1 W. Bl. 93 at p. 95.

(3) *Shuttleworth v. Le Fleming* (1865), 19 C. B. N. S., 687 at p. 703.

(4) Co. Litt. 24b. Wilberforce, pp. 238, 239; Maxwell, 4th Ed., p. 381.

(5) *Manjaya v. Sesha Shetti* (1889), 11

Mad., 477; *Queen-Empress v. Babaji* (1892), 17 Bom., 127; *Queen-Empress v. Balkrishna* (1893), 17 Bom., 573. See *Hinde v. Bandry* (1876), 2 Mad., 13.

(6) *Per Lord Blackburn, Countess of Rothes v. Kircaldy Waterworks* (1882), 7 App. Cas., 694 at p. 702. See Maxwell, p. 300.

do so, you must not suppose that the Legislature intended to do a palpable injustice.(1) If an enactment is such that by reading it in its ordinary sense you produce a palpable injustice, whereas by reading it in a sense which it can bear, although not exactly in its ordinary sense, it will produce no injustice; then one must always assume that the Legislature intended that it should be so read as to produce no injustice.(2) On the general principle of avoiding injustice and absurdity, any construction would, if possible, be rejected, unless the policy and object of the Act required it, which enabled a person to defeat or impair the obligation of his contract by his own act, or otherwise to profit by his own wrong. Thus an Act which authorised justices to discharge an apprentice under certain circumstances, from his indenture, "on the master's appearance" before them, would justify a discharge in his wilful absence. The Act, it was observed, must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy. It would be very hard that, supposing the master was profligate and ran away, the apprentice should never be discharged.(3) There is no doubt that in some cases the word 'must' or the word 'shall,' may be substituted for the word 'may'; but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word 'may' must be taken to be used in its natural, therefore in a permissive, and not in an obligatory, sense. In construing ss. 20 and 21 of Act XIV of 1859 their Lordships

(1) *Per Brett, L. J., Ex parte Corbett* (1880), L. R., 14 Ch. Div., 122 at p. 129.

(2) *Per Brett, M. R., Queen v. Overseers of Tonbridge* (1884), 13 Q. B.

D., 339 at p. 342; s.c. 53 L. J. Q. B., 491.

(3) *Maxwell*, p. 311. See *Gowan v. Wright* (1886), 18 Q. B. D., 204, s.c. 56 L. J. Q. B., 132.

of the Privy Council held that the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act" meant that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and that the words "but process of execution may be issued" meant that, notwithstanding anything mentioned in the preceding section, execution might issue either within the time limited by law, or within three years after the passing of the Act, whichever should first expire.(1) In construing the Charter of the Bombay High Court their Lordships of the Privy Council made the following remarks :(2) "Now first of all, arises upon this, the obvious construction of the words, that it seems impossible to give a discretionary power, of either allowing or denying, in more clear and plain terms, than these terms are, 'full and absolute power to allow or deny.' And then, that is followed by saying that the terms may be regulated by the Court 'in cases in which the said Court may think fit to allow such appeal,' being a very ordinary expression used in Acts of Parliament, when it is intended that a power given to any officer or anybody for public purposes, shall not be absolute and compulsory upon that individual officer, or that body, but shall be discretionary in that individual officer or body to exercise or not, as he or they shall please, and be advised. If the words are 'it shall and may' be so and so done, by such and such officer and body, then the word 'may' is held in all soundness of construction to confer a power, but the word 'shall' is held to make that power,

(1) *Delhi and London Bank v. Orchard* (1877), 3 Cal., 47 at p. 57; s. c. 4 I. A., 127 at pp. 135, 136.

(2) *Queen v. Alloo Parco* (1847), 3 M. I. A., 488 at pp. 492, 493, *per Lord Brougham.*

or the exercise of that power, compulsory ; cases are not wanting where, even without the use of so stringent a word as 'shall,' it has been held that a power so conveyed must be executed. But where it is intended not to compel, but to leave it optional with the parties, the words 'think fit' are the very ordinary technical and appointed words, to show that the power is not compulsory. And those words occurring in this clause, they seem really to have no reasonable doubt, that a discretion is vested in the Court below, of denying as well of allowing an appeal."

The literal construction then, has, in general, but *prima facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act ; to consider according to Lord Coke, (I) what was the law before the Act was passed ; (II) what was the mischief or defect for which the law had not provided ; (III) what remedy Parliament has appointed ; and (IV) the reason of the remedy.(1) In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without enquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view ; for the meaning of words varies according to the circumstances with respect to which they were used.(2) Where the context discloses a manifest inaccuracy, the sound rule of construction is to eliminate

(1) Maxwell, pp. 30, 31, *per Halsbury, L. C., Eastman v. Comptroller of Patents* (1898), A. C. at p. 573.

(2) *Per Blackburn, L. J., River Weir Commissioners v. Adamson* (1877), 2 App. Cas. at p. 763.

the inaccuracy and to execute the true intention of the Legislature. (1)

Rule 5. General provisions in the same Statute or other Statutes are not to control or repeal the special provisions. The special provisions are to be read as excepted out of the general provisions.

“ The first thing you have to consider is, that where you have general provisions, whether contained in the same Act or in another Act of Parliament, and where you have special provisions as to a particular property in the ownership of one individual, you must read the special provision as excepted out of the general. That is the only way of reconciling these Acts of Parliament. It is the practice of Parliament, as those who are in the habit of going before Parliamentary Committees know, to insert in the bill the special clauses which are agreed on, and then those persons who have obtained their insertion leave the committee-room, and have nothing further to do with the bill. The Committee would not listen to them on the general clauses. They would only say, ‘ It is no business of yours ; you have been provided for, and have had all your clauses put in. If you once admit the doctrine that the General provisions are to override the special ones, anybody getting a clause inserted in the bill ought to be heard on every clause of that Act. It would be simply impossible to conduct private legislation at all, if any such doctrine were admitted or prevailed. I consider it to be the established rule, that when you find general provisions of this sort, either in the same Act or other Acts, they are not to control or repeal the special provisions,

which are considered to provide for the particular property.(1)

Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one. Even when the later, or later part of the enactment is in the negative, it is sometimes reconcilable with the earlier one by so treating it. If, for instance, an Act in one section authorized a Corporation to sell a particular piece of land, and in another prohibited it to sell "any land" the first section would be treated not as repealed by the sweeping terms of the other, but as an exception to it.(2)

It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the Statute, to say that a general Act is to be construed as not repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later law does not abrogate an earlier special one by mere implication. *Generalia specialibus non derogant*; the law does not allow the exposition to revoke or alter, by construction of general words, any particular Statute, when the words may have their proper operation without it. It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act, or, what is the same thing, by a local custom. Having already given its attention to the particular subject, and provided for it the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit

(1) *Per Jessel, M. R., Taylor v. Corporation of Oldham* (1876), I. R., 4 Ch. Div. at p. 410; Maxwell, p. 58.

(2) Maxwell, p. 252.

language, or there be something which shows that the attention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general Statute is read as silently excluding from its operation the cases which have been provided for by the special one.(1)

(1) Maxwell, pp. 263, 265.

LECTURE XII. (I).

A STATUTE may be divided into five parts ;—(I) the title ; (II) the preamble ; (III) the interpretation-clause ; (IV) the enacting clauses ; and (V) the schedules. Marginal notes to sections of an Act do not form part of an Act. (1)

(I) *The title*.—It was at one time laid down by the Courts in England that the title could not be resorted to in construing an enactment (2) and that though it had occasionally been referred to as aiding in the construction of an Act it was certainly no part of the law, and, in strictness, ought not to be taken into consideration at all. (3) But it is now settled law in England that the title of an Act of Parliament is to be read as part of the enactments. Lindley, M. R., in dealing with a case arising under the Public Authorities Protection Act 1893 (56 and 57 Vict., c. 61), (4) said : “I read the title advisedly, because now, and for some years past, title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it ; but now the title is

(1) *Sutton v. Sutton* (1882), L. R., 22 Ch. D., 511; *Dukhi Mollah v. Holway* (1895), 23 Cal., 55; *Punardeo v. Ram Sarup* (1898), 25 Cal., 858; s. c. 2 C. W. N., 577; but see *Kameshar v. Bhikan* (1893), 20 Cal., 609.

(2) *Per Lord Cottenham, Hunter v. Nockolds* (1850), 1 Man & Gord., 651.

(3) *Per Pollock, C. B., Salkeld v. Johnson* (1848), 2 Ex., 282, 283; Maxwell, 4th Ed., 60.

(4) *Fielding v. Morley Corporation*, (1899), 1 Ch., 3 and 4. See *Att.-Gen. v. Margate Pier and Harbour* (1900), 1 Ch., 754.

an important part of the Act." It is quite true that, although the title of an Act cannot be made use of to control the express provisions of the Act, yet if there be in these provisions anything admitting of a doubt, the title of an Act is a matter proper to be considered, in order to assist in the interpretation of the Act, and thereby to give to the doubtful language of the Act a meaning consistent rather than at variance with the clear title of the Act.(1)

(II) The preamble is undoubtedly part of the Act.(2) It is a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the Statute ;(3) and its proper function is to explain certain facts which are necessary to be explained before the enactments contained in the Act can be understood.(4)

(III) By an interpretation-clause it is enacted that certain words when found in the Act are to be understood in a certain sense, and are to include certain things which, but for the Interpretation-clause, they would not include.

Rule 6. Where the enacting part is unambiguous, the preamble cannot be resorted to control it : but where it is ambiguous the preamble can be resorted to explain it.

Where the language of the enacting sections of a Statute is clear, the terms of a preamble cannot be called in aid to restrict their operation, or to cut them down. The purpose for which a preamble is framed to a

(1) *Per Lefroy, C. J., Shaw v. Rud-din* (1859), 9 Ir. C. L. R., 219.

(2) *Salkeld v. Johnson* (1848), 2 Ex.,

3) 7 Bac. Abr. Statute (I).

(4) *Lord Thring, Practical Legisla-*

tion, p. 36.

Statute is to indicate what in general terms was the object of the Legislature in passing the Act, but it may well happen that these general terms will not indicate or cover all the mischief which in the enacting portions of the Act itself are found to be provided for.(1) Where the intention of the Legislature is declared by the preamble, effect is to be given to the preamble to this extent, namely, that it shows what the Legislature are intending ; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to that preamble, in either case that meaning is to be preferred to one showing an intention of the Legislature which would not answer to the purposes of the preamble or which would go beyond them.(2) Where the object or meaning of an enactment is not clear "the preamble of a Statute is a good means to find out the meaning of the Statute and as if it were a key to open the understanding thereof."(3) If very general language is used in an enactment which, it is clear, must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply. But it must always be a question of some nicety for the Court to determine whether an Act is sufficiently explicit by itself or whether the preamble should be looked to for aid in explanation of it.(4) And further the enacting clause may be carried beyond the preamble if words be found in the former strong enough for the purpose.(5)

(1) *Q. v. Indarjit* (1889), 11 All., 266.
See Maxwell, pp. 66, 67.

(2) *Per Lord Blackburn, Overseers of West Ham v. Iles* (1883), 8 App. Cas., 388, 389.

(3) Coke, I Inst, 79a.

(4) *Craies*, pp. 186, 187.

(5) *Chinna Aiyen v. Mahomed* (1865), 2 M. H. C., 322.

Rule 7. An interpretation-clause should be used for the purpose of interpreting words which are ambiguous or equivocal and not so as to disturb the meaning of words which are plain.

The object of an interpretation-clause is primarily to obtain a uniform and consistent interpretation of many words appearing in various Acts in order that the system of laws should harmonize as a whole, and that each Statute should have a uniform and consistent interpretation put on it. But although the effect of an interpretation-clause is to give the meaning assigned by it to the word interpreted in all places in the Act in which that word occurs, it is not the effect of an interpretation-clause that the thing defined has annexed to it every incident which may seem to be attached to it by any other Act of Legislature.(1)

An interpretation-clause which extends the meaning of a word does not take away its ordinary meaning, and is sometimes not meant to prevent the word receiving its ordinary popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable.(2) Sometimes a term is defined in an interpretation-clause merely *ex abundanti cautela*--that is to say, to prevent the possibility of some common law incident relating to that term escaping notice.(3) Moreover an interpretation-clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be

(1) *Uma Churn Bag v. Ajadunnessa Begum* (1885), 12 Cal., 430. *Barton Eccles, L. B.* (1883), 8 App. Cas., 801; *Craies*, p. 195.

(2) *Per Selborne, L. C., Robinson v.* (3) *Craies*, p. 196.

under *all* circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended. If, therefore, an interpretation-clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may always be a matter for argument whether or not the interpretation-clause is to apply to the word as used in the particular clause of the Act which is under consideration.(1)

Rule 8. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.

Though it has been laid down that the schedule is as much a part of the Statute, and is as much an enactment, as any other part,(2) still, a schedule is as a rule generally appended to an Act for the sake of convenience. "Forms in schedules are inserted merely as examples, and are only to be followed implicitly so far as the circumstances of each case may admit";(3) consequently it may sometimes happen that there is a contradiction between the enactment and the form in the schedule. In such a case "it would be quite contrary to the recognized principles upon which Courts of law construe Acts.... to enlarge the conditions of the enactment and thereby restrain its operation by any reference to the words of a mere form given for 'convenience' sake in a schedule."(4)

(1) *Craies*, p. 197; *R. v. Cambridge-shire* (1838), 7 A. & E., 491.

(2) *Per Brett*, L. J., *Att.-Gen. v. Lamplough* (1878), 3 Ex. D., 229.

(3) *Per Tindal*, C. J., *Bartlett v. Gibbs*

(1843), 5 M. & G., 96.

(4) *Per Lord Penzance*, *Dean v. Green* (1882), 8 P.D., 89. See *R. v. Barnes* (1840), 12 A. & E., 226; *Craies*, p. 204.

Rule. 9. When the language of a Statute is ambiguous, the Court is entitled to take into consideration—(a) What was the law before the Act was passed; (b) What was the mischief or defect for which the law had not provided; (c) What remedy the Legislature has appointed; and (d) the reason of the remedy.(1)

In *Eastman v. The Comptroller-General*,(2) Halsbury, L. C., after reciting the above rule in the course of his judgment, said :—“ Turner, L. J., in *Hawkins v. Gathercole*,(3) and adding his own high authority to that of the Judges in *Stradling v. Morgan*,(4) after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case : that the judges have collected the intention ‘sometimes by considering the cause and necessity of making the Act...sometimes by foreign circumstances’ (thereby meaning extraneous circumstances), so that they ‘have ever been guided by the intent of Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.’ And he adds : We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature; to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from the foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light on the subject. Lord Blackburn in *River Weir Commissioners v. Adamson*(5) says :—In all cases the object is to see what is the intention expressed by the words used. But, from the

(1) *Heydon's case*, 3 Rep., 8.

(2) (1898), A. C. 571, 575.

(3) (1855), 6 D. M. & G. 1, 21.

(4) (1854), 1 Plowd., 204.

(5) (1877) 2 App. Cas., 743, 763. See *Prabhakarbhāt v. Vishwambhar* (1884), 8 Bom., 321.

imperfection of the language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view."

"My Lords, it appears to me that to construe the Statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the latter Act which provided the remedy."

This rule is analogous to those rules dealing with deeds and wills which provide that the interpreter should as far as possible put himself in the position of those whose words he is interpreting, so as to be able to see what those words relate to.

With regard to Statutes that are intended to codify any particular branch of the law this rule has very little application. In *Vagliano v. Bank of England*(1) Lord Halsbury, L. C., stated "I am wholly unable to adopt the view that, where a Statute is expressly said to codify the law, you are at liberty to go outside the Code so created, because before the existence of that Code another law prevailed." And in the same case Lord Herschell laid down.(2) "The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and

(1) (1891), A. C. at p. 120.

(2) *Ib.* at p. 144 referred to by the P. C. as to the proper mode of dealing with an Act intended to codify a partic-

ular branch of the law. *Narendra Nath Sircar v. Kamalvasini Dasi* (1896), 23 Cal., 563, 571; s. c. 23 I. A., 26.

then, assuming that it was probably intended to have it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

" If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a Code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or have been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the Code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the Statute, and that an appeal to earlier decisions can only be justified on some special ground."

The very object of consolidation is to collect the statutory law bearing upon a particular subject and to

bring it down to date, in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act is passed.(1)

Proceedings of the Legislature which result in the passing of an Act are not legitimate aids in construing that Act or any particular section of the Act. The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction, are equally cogent in the case of an Indian Statute.(2) It is submitted that such proceedings include Reports of the Indian Law Commissioners; Proceedings of the Legislative Council; Reports of Select Committees of the Legislative Council; Draft Stages of a Bill; and Statements of Objects and Reasons attached to Bills.

Rule 10. Remedial Statutes must be construed liberally and Penal Statutes strictly; and in each case when the meaning is doubtful in the manner most favourable to the liberties of the subject.

Acts which are passed for the expedition of justice and for ousting delays in its administration, for the protection of officers of justice in the discharge of their duties are remedial Acts and are to be extended as far as their words will admit to every case within their purview. So also Statutes which extend the franchise, which take away penalties, which give compensation to persons whose property is taken compulsorily or injuriously affected, which are in favour of agriculture or contain provisions in advancement of trade are to be liberally construed.(3) A liberal construction of a Statute is the one that gives the words of the Statute

(1) *Admr.-Genl. of Bengal v. Prem-lall Mullick* (1895), 22 Cal., 798; 22 I. A., 116.

(2) 22 Cal., pp. 799, 800; 22 I. A., 118.
(3) *Wilberforce*, p. 231.

the fullest and most extensive meaning of which they are susceptible. In expounding remedial laws it is a settled rule of construction to extend the remedy as far as the words will admit (1) Everything is to be done in advancement of the remedy that can be done consistently with any construction of the Statute. (2) The language of the Act is not to be strained but, where the words are open to doubt, they are to receive a construction which may advance the objects of the Act. (3)

The term "Penal Statutes," when it is employed for the purpose of describing such Acts as are to receive a strict construction, is not confined to Statutes that create crimes or impose penalties, but extends to a variety of others, which may be more properly classed as restrictive. Acts which introduce capital punishment, or which shift the burden of proof in criminal cases, may be fitly called penal, and construed with extreme strictness. But it has been also laid down that a strict construction is to be given to Acts which alter the law of evidence, either by creating new statutory modes of proof which may defeat the rights of the parties, or by weakening the principles which had been deemed essential in the reception of testimony; to Acts which take away the right of trial by jury, and abridge the liberty of the subject, which confer a new jurisdiction, and derogate from the jurisdiction inherent in the superior Courts; which are restrictive of the common law, take away vested rights or the franchise, restrict the liberty of marriage, defeat deeds that have been solemnly executed or cut down, and abridge, restrain or

(1) *Per* Lord Kenyon. Cf. *Turtle v. Hartwell* (1795), 6 T. R., 429.

(2) *Wilberforce*, p. 235: See *Johnes v. Johnes* (1814), 3 Dow., 15.

(3) *Per* Turner, L. J., *Dover Gas Co. v. Mayor of Dover* (1855), 7 De G. M. & G., 555.

avoid any written instrument. Acts which impose taxes are to be construed strictly and so are such as impose charges, duties or any other burdens upon the public, the Acts themselves being construed strictly, while any exception which confines the operation of such charges or duties is to be construed liberally. Clear language is necessary in Acts which infringe the legal rights of subjects or impose taxes.(1)

Some Statutes that may be properly called remedial have an operation which is partly penal. Where grievances have to be redressed or property to be protected, there are offenders as well as sufferers, assailants as well as assailed. The Act which gives a remedy to one who is aggrieved almost inevitably inflicts a penalty on his opponent. But if the primary object of the Act be redress not punishment, it is to be construed liberally. The legal distinction between Remedial and Penal Statutes is this, the former give relief to the parties grieved, the latter imposes penalties upon offences committed. It is a clear and fundamental rule in construing Statutes against frauds that they are to be liberally and beneficially expounded. Where the Statute acts against the offender and inflicts a penalty it is then to be construed strictly, but where it acts upon the offence by setting aside the fraudulent transaction it is to be construed liberally.(2)

Nothing is to be regarded as within the meaning of a Penal Statute, which is not within the letter—which is not clearly and intelligibly described in the very words of the Statute itself. When an offence against the law is alleged, and the Court has to consider whether that alleged offence falls within the language of a criminal

(1) Wilberforce, pp. 243—245.

(2) *Per Park, J., Gorton v. Champ-*

neys (1823), 1 Bing., 301; Wilberforce,

pp. 232-233.

Statute, the Court must be satisfied not only that the spirit of the legislative enactment has been violated, but also that the language used by the legislature includes the offence in question, and makes it criminal.(1) A Penal Statute should, when its meaning is doubtful, be construed in the manner most favourable to the liberties of the subject, and this is more especially so when the penal enactment is of an exceptional character.(2) If by a Statute it is intended to impose a tax upon the subject, its construction must be clear beyond all reasonable doubt; and the common law rights of the subject in respect to the enjoyment of his property are not to be trespassed upon by a Statute, unless the intention is shown by clear words or necessary implication.(3) Acts relating to the acquisition of lands for public purposes must be construed most strictly in favour of the subject.(4) So also Statutes of Limitation being Statutes in limitation of a common right are not to be extended by construction to cases not clearly included within their terms.(5)

But where a Statute imposes a duty, it without express words gives an action for the failing to perform it and for wrongfully performing it.(6) If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case. But where an Act creates an obligation, and enforces the performance in a specified manner, it is a general rule that.

(1) *Emp. v. Kola Lalang* (1881), 8 Cal., 216. See *Lord Huntingtower v. Gardiner* (1823), 1 B. & C., 299; *R. v. Bond* (1818), 1 B. & Ald., 392; *Britt v. Robinson* (1870), L. R., 5 C. P., 1870.

(2) *R. v. Bhista* (1876), 1 Bom., 311.

(3) *Dullabh v. Hope* (1871), 8 Bom. H. C. R., 217. See *Leman v. Damoda-*

raya (1876), 1 Mad., 158.

(4) *Sorabji v. The Justices of Peace* (1875), 12 Bom. H. C. R., 255.

(5) *Parashram v. Rakhma* (1890), 15 Bom., 305.

(6) *Ponnusamy v. Collector of Madura* (1863), 3 M. H. C. R., 37.

performance cannot be enforced in any other manner.(1) And an action will not lie for the infringement of a right created by Statute, where another specific remedy for infringement is provided by the same Statute.(2) There is a difference between a case in which a Court or an officer of a Court omits to do something which, by a Statute it is enacted shall be done, and cases in which a Court or an officer of a Court does something which, by a Statute it is enacted shall not be done. In the one case the omission to do an act which by the Statute it is enacted shall be done, may not amount to more than an irregularity in procedure, whilst in the other case, in which the prohibition is enacted, the doing of the prohibited thing by the Court or the official is *ultra vires* and illegal, and if *ultra vires* or illegal it must follow that it was done without jurisdiction.(3)

Rule 11. Statutes are *prima facie* deemed to be prospective only.

The general rule governing the construction of Statutes is correctly stated in Bac. Abr. 439, "Statute, C." It is there laid down as, in general, true, "that no Statute is to have a retrospect beyond the time of its commencement ; for the rule and law of Parliament is, that *nova constitutio futuris forman debet imponere, non praeteritis.*" But the general rule is not without exception.(4) In some cases the legislature has thought it just to make enactments retrospective, even at some sacrifice of general principle. But then it does so in express terms ; and generally, I believe invariably, couples the retrospective enactment with the best

(1) *Rochester v. Bridges* (1831), 1 B. & Ad., 859.

(2) *Stevens v. Jeacocke* (1847), 17. L. J. Q. B., 165.

(3) *Rameshur v. Sheodin* (1889), 12 All., 517.

(4) *Per Platt, B., Moon v. Durden* (1848), 2 Ex. R., 27.

indemnity in favour of vested rights which the nature of the case admits.(1) The general principle is that rights already acquired shall not be affected by the retrospective action of a new law.(2) As regards procedure the general rule is, that the law, as it exists when a suit is commenced, must decide the rights of the parties in the suit, unless the legislature has expressed a clear intention to vary the relative rights of the parties to each other.(3) A right of action is not taken away by a change in the law, unless by express enactment ; but in the case of mere procedure, unless something is said to the contrary, the new law, where its language is general in its terms, applies without reference to the former law or procedure.(4) When on a general law, especially of procedure, one more specific is superimposed, effect is to be given to the latter as far as possible along with the earlier one, but, if necessary, in partial supersession of it. The more stringent and narrow rule provided by a later Act is not to be deprived of its effect in any of the cases to which it is applicable, because a less narrow rule was applicable to them in their earlier stages.(5)

The general principle is that alterations in forms of procedure are retrospective in effect and apply to pending proceedings.(6)

The giving of a new right does not of necessity destroy a previously existing right. But it has that

(1) *Per Rolfe, B., Mon. v. Durden* (1848), 2 Ex. R., 39 ; *Dookubdass v. Ram-lall* (1850), 5 M. I. A., 126 ; *Nobokanth Dey v. Rajah Boradakanth* (1864), 1 W. R., 100.

(2) *Morris v. Sambamurthi* (1871), 6 M. H. C. R., 126 ; *General Clauses Act* (X of 1897), sec. 6 ; *Kallian v. Pathubai* (1892), 17 Bom., 289.

(3) *Bungsheedhyr v. Sheik Mahomed* (1862), 1 Hay, 369 ; *Gujrat Trading Co.*

v. *Trikanji* (1866), 3 Bom. H. C. R. O., C., 45.

(4) *Framji v. Hormasji* (1866), 3 B. H. C. R. O. C., 49.

(5) *Shivram v. Kondiba* (1884), 8 Bom., 345.

(6) *Hajrat v. Valiuhnessa* (1893), 18 Bom., 432 ; *Balkrishna v. Bapu* (1894), 19 Bom., 206 ; *Gungarani v. Punam Chand* (1896), 21 Bom., 826.

effect if the apparent intention of the legislature is that the two rights should not exist together.(1) Nor do Statutes take away existing rights except by express words or by plain implication.(2)

Rule 12. A Statute is not to be held to be repealed by implication unless the repugnancy between the new provision and the former Statute be plain and unavoidable.(3)

The Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can from the language of the later imply a repeal of an express prior enactment,(4) *i.e.*, the repeal must, if not express, flow from necessary implication.(5) A bare recital in a subsequent Statute is not sufficient to repeal the positive provisions of a former Statute, without a clause of repeal.(6) And a special enactment is not impliedly repealed by a subsequent affirmative general enactment, if the two enactments are not so repugnant as to be incapable of standing together.(7)

An Act of Parliament cannot be repealed by non-user, notwithstanding any practice that may have obtained to the contrary.(8) While an Act does not become inoperative by mere non-user, however long the time may have been since it was known to have been actually put in force, the fact of non-user may be extremely important, when the question is whether there has been a repeal by implication. What words will constitute a repeal by implication, it is impossible to say from authority or decided cases. If, on the one hand,

(1) *O'Flaherty v. McDowell* (1857), 6 H. L. C., 157.

(2) *Western Counties Rail Co. v. Windsor Rail Co.* (1882), 7 A. C., 188; 51 L. J. P. C., 48.

(3) *Sitapathi v. The Queen* (1882), 6 Mad., 36.

(4) *Thames Conservators v. Hall* (1868), L. R., 5 C. P., 419.

(5) *Craies*, p. 303.

(6) *Dore v. Gray* (1788), 2 T. R., 365.

(7) *Sabapati v. Narainsvami*, 1 M. H. C. R., 115.
(8) *White v. Boot* (1788), 2 T. R., 275.

the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would be declared in express terms; so on the other, it is not necessary that any express reference be made to the Statute which is to be repealed. The prior Statute would, I conceive, be repealed by implication, if its provisions were wholly incompatible with a subsequent one, or if the two Statutes together would lead to wholly absurd consequences, or if the entire subject-matter were taken away by the subsequent Statute. Perhaps the most difficult case for consideration is where the subject-matter has been so dealt with in subsequent Statutes, that, according to all ordinary reasoning, the particular provision in the prior Statute would not have been intended to subsist, and yet if it were left subsisting no palpable absurdity would be occasioned.(1) And though, where the words of an Act of Parliament are plain, it cannot be repealed by *non-user*, yet where there has been a series of practice, without any exception, it goes a great way to explain them when there is any ambiguity.(2)

Rule 13. *Where a Statute creates an obligation, and enforces the performance in a specified manner, it is a general rule that performance cannot be enforced in any other manner. But if an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.(3)*

There are three classes of cases in which a liability may be established, founded upon a Statute. One is, where there was a liability existing at common law, and

(1) *Per Dr. Lushington, The India (1864), B. & L., 224; 33 L. J. Ad., 193.*
 (2) *Per Kenyon, O. J., Leigh v. Kent (1789), 3 T. R., 364. See Hibbert v.*

Purchas (1871), L. R., 3 P. C., 650.
 (3) *Per Tenterden, C. J., Rochester v. Bridges* (1831), 1 B. and Ad., 859.

that liability is affirmed by a Statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: There, unless the Statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the Statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is created by a Statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the Statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the Statute must be adopted and adhered to. (1)

The principle that where a specific remedy is given by a Statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the Statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges*. (2) He says: "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. (3)" This rule, however, does not apply where there are two

(1) *Per Willis, J., Wolverhampton New Water Works v. Hawkesford* (1859), 6 C. B. N. S., 356, cited by Buckley, J., *Att.-Gen. v. Ashbourne Recreation Ground* [1903], 1 Ch., 106; 72 L. J., Ch. 69.

(2) *Ubi supra sub nom Rochester v. Bridges.*
(3) *Per Halsbury, L. C., Passmore v. Oswaldthistle* [1808], A. C., at p. 394.

different rights created by the Statute, one a right to have compensation, and another a different right to have adjudication upon the subject of that compensation.(1)

It is true as a general rule that where a new offence and a penalty for it has been created by Statute a person proceeding under the Statute is confined to the recovery of the penalty and nothing else can be asked for. But there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened, the Court will interfere and prevent the act being done—and as regards the mode of granting an injunction the Court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated. (2)

The distinction between a Statute creating a new offence with a particular penalty and a Statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty is well settled. In the former case the new offence is punishable by the new penalty only ; in the latter it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included. The rule was recognized by Lord Mansfield in *Rex v. Wright* (3) and in a note to 2 Hawkins' Pleas of the Crown (4) is thus stated : "The true rule seems to be this : 'where the offence was punishable before the Statute prescribing a particular method of punishing it, there such particular

(1) *Per Channel, J., R. v. Stepney Corporation* [1901], 1 K. B., 325; 21 L. J. K. B., 241. *Whittingham* (1880), 15 Ch. D., 506, 507; 49 L. J. Ch., 755.

(2) *See per Jessel, M. R., Cooper v.* (3) (1758), 1 Burr., 543.

(4) 1824 (Ed.), p. 290.

remedy is cumulative, and does not take away the former remedy; but where the Statute only enacts that the doing an act, not punishable before, shall for the future be punishable in such and such a particular manner, there it is necessary to pursue such particular method and not the common law method of indictment.' " The same principles apply equally whether the offence is regarded as an invasion of public rights calling for criminal or civil rights calling for civil proceedings.(1)

It is a general rule that subsequent Acts which add accumulative penalties do not repeal former Statutes. (2) Subsequent Acts of Parliament in the affirmative only, although giving new penalties, are never taken to be a repeal of former Acts, unless there be negative words or a plain contrariety between the two Acts so as there is a plain indication in the latter of an intention to repeal the former.(3)

Rule 14. Where the same offence is re-enacted with a different punishment the prior enactment is repealed.(4)

" If a crime be created by Statute, with a given penalty, and be afterwards repeated in another Statute with a lesser penalty attached to it, I cannot say that the party ought to be held liable to both. There may, no doubt, be two remedies for the same act, but they must be of a different nature. The new Act, then, would be in effect a repeal of the former penalty." (5)

" If a later Statute again describes an offence created by a former Statute, and affixes a different

(1) *Per Farwell*, L. J., *Lowe v. Darling* [1906], 2 K. B., 784; 25 L. J. K. B., 1025.

(2) *Per Lord Mansfield*, C. J., *R. v. Jackson* (1775), Cowl., 298.

(3) *Per Lord Hardwick*, L. C.,

Middleton v. Crofts (1736), 2 Atk., 675; Beal, 2nd Ed., p. 451.

(4) Beal, p. 452.

(5) *Per Abinger*, Q. B., *Henderson v. Sherborne* (1837), 2 M. & W., 236.

punishment to it, varying the procedure, etc., giving an appeal where there was no appeal before, we think that the prosecutor must proceed for the offence under the later Statute. If the later Statute expressly altered the quality of the offence, as by making it a misdemeanour instead of a felony or a felony instead of a misdemeanour, the offence could not be proceeded for under the earlier Statute: and the same consequence seems to follow from altering the procedure and the punishment.”(1)

Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.(2)

Rule 15. A repealed statute is considered as if it had never existed except as to transactions passed and closed taken under it.(3)

The effect of repealing a Statute is to obliterate it as completely as if it had never existed; it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded, while it was an existing law.(4)

Where an Act repealing, in whole or in part, a former Act, is itself repealed, the last repeal does not revive the Act or provisions before repealed unless words be added reviving them. It is doubtful whether this rule applies to a 'repeal by implication; but it seems

(1) *Per* Campbell, C. J., *Mitchell v. Brown* (1858), 1 Ell. & Ell., 274; 28 L. J. M. C., 55.

(2) General Clauses Act (X of 1897), s. 26.

(3) *Per* Tenterden, C. J., *Surtess v.*

Ellison (1829), 9 B. & C., 752.

(4) *Per* Tindal, C. J., *Kay v. Godwin* (1830), 6 Bing., 582-3, cited *Attorney-General v. Lamplough* (1873), 3 Ex. D., 217. See General Clauses Act (X of 1897), s. 6.

not to apply where the first Act was only modified by the second, by the addition of conditions, and the enactment which imposed these was, itself, afterwards repealed. In such a case, the original enactment would revive.(1)

If a contract was illegal when it was entered into, and the Statute which made it so is afterwards repealed, the repeal will not give validity to the contract, unless it appears that the repealing enactment was intended to have a retrospective operation, and thus to vary the relation of the parties to each other.(2)

If a right has once been acquired by virtue of some Statute, it will not be taken away again by the repeal of the Statute under which it was acquired. The law itself may be disannulled by the author, but the right acquired by virtue of that law whilst in force must still remain; for, together with a law, to take away all its precedent effects would be a high piece of injustice.(3)

But while a right acquired by virtue of a Statute is not taken away by the repeal of that Statute, it is not augmented by the repeal.(4)

(1) Maxwell, p. 623.

Law of Nature and Nations, Bk. I, c. 6,

(2) *Ib.*, p. 627. *Hitchcock v. Way*

§ 6.

(1837), 6 A. & E., 947.

(4) Craies, p. 343.

(3) Craies, p. 343, citing Puffendorf's

INDEX.

	PAGE.
ACCUMULATION—	
trust for perpetual, void as regards Hindu Law	... 124
allowed by s. 104 of Succession Act	... 178
ACT (S)—	
XIV of 1859 (Limitation) :	
s. 15	... ... 59
ss. 20, 21	... ... 196
X of 1865 (Succession) :	
s. 3	... ... 2
s. 5	... ... 107
s. 61	... ... 40, 107
s. 63	... ... 31, 32, 115, 118
s. 65	... ... 31, 32, 115, 118
s. 66	... ... 119
s. 67	... ... 31
s. 68	... ... 31
s. 69	... ... 6
s. 70	... ... 110
s. 72	... ... 11
s. 73	... ... 110
s. 74	... ... 124
s. 75	... ... 130
ss. 78 to 81, 84, 86, 87	... 179, 180
s. 82	... ... 138
s. 96	... ... 161, 162
s. 98	... ... 149
s. 99	... ... 9, 174, 175
ss. 100, 101	... ... 9, 174, 175
ss. 102, 103	... ... 174, 175
s. 104	... ... 174, 175, 178
s. 105	... ... 174, 175
s. 106	... ... 166

	PAGE.
ACT (S)—<i>contd.</i>	
X of 1869 (Succession) : <i>contd.</i>	
ss. 113, 114 170	
s. 159 138	
XXI of 1870 (Hindu Wills) :	
s. 6 116	
s. 33 162	
I of 1872 (Evidence) :	
s. 92 ... 47, 51, 53, 56, 58, 157	
s. 93 30, 65	
s. 94 62	
s. 95 31, 65	
ss. 96, 97, 98 31	
IX of 1872 (Contract) :	
s. 25 52	
s. 27 102	
XIV of 1882 (Civil Procedure) :	
ss. 276, 311 23	
X of 1897 (General Clauses) :	
s. 6 ... 215, 221	
how construed 4	
practice as applied to construing of 18	
presumption when an, repeals a preceding Act relating to a certain definite subject-matter 19	
general rules for construction of, of Parliament ... 188	
literal construction ought not to prevail when opposed to legislature's intention 189	
proceeding of legislature not legitimate aids in construing the 209	
relating to acquisition of lands, how to be construed ... 213	
repeal of, of Parliament by non-user ... 216, 217	
effect where an, repealing a former Act is itself repealed ... 221	
AGREEMENTS—	
by way of wager void 51	
admissibility of evidence as to, in a deed 51	
proof of existence of separate oral 53	
on what the true construction of, depend 62	
in restraint of trade how governed 102	
ANNEXING INCIDENTS—	
meaning of 54	

	PAGE.
ARGUMENT—	
of inconvenience, force of	24
ALTERATION—	
in material point when, avoids a deed	88
when material	88
enforcement of obligation when, made with consent of parties	88
presumption as to, when made	88
effect of, if made after execution	89
if made by a stranger	89
BEQUEST—	
to children of a foreigner, meaning of	107
wrong description not avoiding a	115
ordinary principle and rule of law in construing a ...	118
description of, where made up of more than one part : some true and some untrue, rejection of	118
application of doctrine of <i>falsa demonstratio</i> to ...	119
when to be considered to be limited to certain property ...	119
rejection of any part of description as erroneous is illegal ...	119
for charitable purpose	126—129
when void for uncertainty	132
right to legacy where property bequeathed with, in the alternative	143
where made to a class of persons under general description how effected	144
when made to a described class of person how effected ...	147
kinds of	157
to legatees as joint tenants	158
to any child or other lineal descendants of testator ...	161
original, not affected if ulterior bequest not valid ...	168
depending upon impossible condition or one contrary to law void	170
on death-bed to charitable or religious uses ...	178
CHARITY—	
bequest to	126—129
CHILD—	
bequest to, of a foreigner means to his legitimate one	107
law establishing legitimacy of	107
bequest to any, or lineal descendants	116
B. DWS	15

	PAGE.
CODE OF CIVIL PROCEDURE—	
<i>See</i> ACTS.	
CODICIL—	
considered as part of a will 7	
definition of 105	
probate of, when will revoked 106	
where two legacies are made to the same person in will or, how to be effected 150	
right of legatee where legacies are given to him, one by will and the other by, or by different codicils 151	
when not included in the term "will" 151	
COMMON LAW—	
what is 2	
CONDUCT—	
evidence of, of parties when admissible 58	
CONSIDERATION—	
kinds of 73	
always stated in words 74	
CONSTRUCTION (S)—	
deed should be put upon liberal 5, 11	
when two, open more reasonable of two to be adopted 16	
rejection of, to avoid injustice and absurdity 17	
rule of, when context discloses a manifest inaccuracy 18	
rule for, of Statutes 18	
rule of, relating to will as stated by Wigram, V.C. 24	
when opposed to legislature's intention mere literal, of a Statute ought not to prevail 23	
principle of equitable, not to be carried beyond certain bounds 28	
on what the true, of agreement depends 62	
mis-recital may influence the 84	
of will belongs to Court of domicile 106	
CONTRACT—	
to be literally construed 11	
form of expression less regarded than meaning of parties 11	
oral evidence as to, voidable by Statute or common law 52	
terms in usual mercantile 61	
terms in unusual 62	
form immaterial in, not under seal 70, 71	

	PAGE.
COUNTERPANES—	
meaning of	68
COUNTERPART—	
meaning of	68
COVENANTS—	
definition of	92
how distinguished	92
when a cause of action	92
particular form of words not necessary to create ...	93
implication of other covenants when deed contains express words of, to be taken most strongly against covenantor ...	94
ambiguous words of, to be taken strongly against grantor and in favour of grantee	94
for title, who are bound by	95
exception to the general rule of	96
how construed to be joint or several	
sum to be paid on non-performance of, whether as penalty or liquidated damages how to be determined	98
different kinds of	100
rules governing construction of restrictive	102
DAKHILAR—	
<i>See Words.</i>	
DEED (S)—	
definition of	
object of interpretation of	
literal construction should be put upon	5, 11
duty of Court in interpreting a	22
elimination of word or phrase when made in a, far more formal than will	37
distinction between will and	41
definition of	40
use of particular form in delivery of	49
retention of, after its execution by its maker does not invalidate it	46
registration of, of sale is its sufficient delivery	46
oral evidence affecting the terms of	47
cases to which rule 1 of, applicable	48
when extrinsic evidence admissible as to ...	49, 50

	PAGE.
DEED (S)—<i>contd.</i>	
time when to take effect	50
date in, meaning of	50
admissibility of evidence as to agreement in a	51
fraud violates all	51
admissibility of evidence when execution of, obtained by fraud	51
made without consideration when void ...	52
latent ambiguity of, extrinsic evidence may be given to explain	65
component parts of	68
time when it takes effect	69
where several and inconsistent	69
name of parties should be formally stated in	69
parties to, how described	71
how to be interpreted	78
can operate two ways : (i) one consistent to intention, (ii) the other repugnant to it	78
rules and maxims as to construction of	78
when full effect cannot be given to intention of maker of ...	79
made and intended to one purpose may enure to another ...	79
diverse persons in, some of whom capable and some not, effect where there are	79, 80
control of recital when operative part of, clear ...	81
mis-recital of another document in, effect of ...	81
control of recital when operative part of, are ambiguous ...	82
when mis-recital will not vitiate the... ...	84
DEEDS-POLL—	
what is called	69
to what deeds applied	69
place of date in	69
formal method of stating parties in ...	70
DEVISE—	
to widow for her maintenance with power of alienation confers an absolute estate	16
of rents and profits passes the land itself	138
rule founded on feudal law	139
not passing an absolute estate where estate vested in trustees and income given as maintenance	139
varying decisions as regards, of immovable property to Hindu widows	146

				PAGE.
DEVISE — <i>contd.</i>				
rules laid down by Wood, V. C., as to	...	...		175, 176
limitation where, void for remoteness	...	...		... 177
DHARAM —				
how defined	...	...	...	... 133
DHARMADA —				
held to be void for uncertainty	...	...	...	.. 134
DOMICILE —				
interpretation and construction of will belongs to Court of	...	...	...	106
questions of testacy and intestacy belongs to Judge of	...	...	...	106
Court of, is the <i>forum concursus</i>	...	...	...	106
DUPLICATE ORIGINAL —				
meaning of	...	...	...	... 68
EQUITABLE CONSTRUCTION —				
<i>See</i> CONSTRUCTION.				
EQUITY —				
of Statute, definition of	...	...	...	28, 195
striking instance of	...	...	...	... 29
EQUIVOCATION —				
when it arises	...	...	...	... 67
extrinsic evidence as to, when admissible	...	...	...	... 67
ESTATE —				
given without words of inheritance what it carries	...	...	...	... 138
if imperfect description be added to such gift	...	...	...	... 138
ESTATE TAIL —				
attempt to create an, by Hindu void	...	...	...	... 126
ESTOPPEL —				
misrecital may operate by way of	...	...	...	... 85
principle of	...	...	...	... 85
recital must be precise and unambiguous to operate as an	...	...	...	... 85
EVIDENCE —				
extrinsic, may not be given to explain latent ambiguity	...	...	...	30, 32
extrinsic, when may be given to explain ambiguity	...	...	...	33
extrinsic, necessary to point the operation of simple instrument	...	...	...	34
admissibility of, as to agreement in a deed	...	...	...	51
of material fact in instrument admissible	...	...	...	56
of conduct of parties when admissible	...	...	...	58

	PAGE.
EVIDENCE—<i>contd.</i>	
ground on which such, is admitted ...	... 59
admissible to show parties to instrument ...	... 61
circumstances under which the instrument is executed ... ... ...	... 61
meaning which they affix to any word ...	... 61
extrinsic, as to equivocation when admissible ...	... 67
EVIDENCE ACT—	
<i>See</i> <i>Acts.</i>	
EXTRINSIC EVIDENCE—	
<i>See</i> <i>Evidence.</i>	
FRAUD—	
violates all deeds	51
admissibility of evidence where execution of deeds obtained by conflict of opinion as to whether, contemporaneous or subsequent	51
Statutes against, how construed	212
GIFT (S)—	
of all the testator's property when followed by gift of specific portion of it	12
to a class, some of whom are or may be incapacitated from taking	80
what intention is implied in, to a class	146
when it is said to be immediate	146
postponed	147
right of person to take under specific	147
double, of the same specific thing	152
implication of, when there is no certainty as to persons to take under it	154
to a class	157
substitutional	158
intention that a, is not to become vested in interest how shown	168
ground on which a, fails	177
rules for construction of	180
GOLDEN RULE—	
of Lord Wensleydale	21, 63
GOVERNOR-GENERAL—	
power of, to make laws and regulations	184

	PAGE.
HINDU WILLS ACT—	
compared with Succession Act	8
its application	9
Acts like, how to be construed	9
<i>See</i> Acts.	
IDENTICAL INTENTION—	
explained	70
IMMOVABLE PROPERTY—	
<i>See</i> PROPERTY	
INDENTURE—	
meaning of ... ... ...	... 68, 69
place of date in ... ... ...	... 69
form of ... ... ...	... 70
INHERITANCE—	
estate given with words of, what it carries ...	... 138
if imperfect description be added to such gift ...	... 138
INTENTION—	
meaning of ... ... ...	... 3
how to be collected ... ... ...	... 3
Court to proceed upon, as evidenced by surrounding circumstances ... ... ...	... 4
how to know the testator's ... ... ...	... 4
sense in which used in lectures ... ... ...	... 5
of testator how indicated by invalid gift over ...	... 8
mere literal construction of a Statute ought not to prevail when opposed to legislature's ... ... ...	... 23
of legislature how ascertained ... ... ...	... 27
of maker of deed, when full effect cannot be given to technical forms not necessary to convey the, of testator ...	... 79
of testator how obtained ... ... ...	... 107
admissibility of extrinsic evidence as to testator's, in case of ambiguity in will ... ... ...	... 122
how effect to be given to the, of testator ... ... ...	... 124
to create a known estate of inheritance how effected ...	... 126
what, is implied in gift to a class ... ... ...	... 146
that a gift is not to become vested in interest how shown ...	... 168
how to be ascertained ... ... ...	... 192
right of Court to depart from, of legislature ...	... 196

	PAGE.
INTEREST—	
right to, where property is bequeathed to a person	... 138
kinds of estate and, in property ...	... 166
INTERPRETATION—	
object of ... ... ...	... 3
where clause susceptible of two meanings	... ... 10
decision on the, of written instrument	... .. 42
of will belongs to Court of domicile	... ... 106
object of, of will ... ..	... ... 107
where language plain and unambiguous	... ... 190
INTERPRETATION-CLAUSE—	
what is enacted by ... ... ...	... 203
object of ... ... ...	... ... 205
extends but does not take away ordinary meaning of word ..	205
not to be taken as substituting one set of words for another ...	205
INTERPRETER—	
business of, regarding Statutes ... ...	... ... 5
INSTRUMENT (S)—	
general rules relating to interpretation of written	... 1 - 45
classes of ... ... ...	... ... 1
leading principles governing the interpretation of	... ... 1
object of interpretation of written (Rule A) ...	... ... 3
when in, two constructions open, more reasonable of the two	
to be adopted ... ... ...	... ... 16
maxims in construing written ... ...	... ... 5
supply of word in ... ...	... ... 6
meaning of its clause how collected ...	... ... 6
all its parts to be construed with reference to each other ...	... ... 6
spirit is strong enough to overcome the letter of ...	... ... 7
rule of construction of ... ...	... ... 7
where clause susceptible of two meanings ...	... ... 10
form of expression less regarded than meaning of parties ...	... ... 11
where clause or expression otherwise senseless and contradictory how made consistent ...	... ... 12
misuse of word or phrase in ... ...	... ... 12
mode of construing words of an ...	... ... 14
use and object of sweeping clause in an ...	... ... 14
mere false description does not make an, inoperative ...	... ... 32

	PAGE.
INSTRUMENT (S)—<i>contd</i>	
situation of parties to be looked at in construing written	... 34
extrinsic evidences necessary to point the operation of simple	... 34
power of Court to alter or insert words in	... ... 37
mere surplusage does not injure	... ... 31
decision on the interpretation of written	... ... 42
evidence of material facts in, admissible	... ... 56
external information requisite in construing every	... ... 57
evidence admissible to show parties to	... ... 61
technical words in	... ... 61
JURISDICTION—	
territorial, attaches upon all persons	... ... 185
LANGUAGE (S)—	
of testator when can be altered	... ... 12
ground for altering testator's, in certain cases	... ... 13
of a will when clear and consistent receives its literal	
construction	... ... 15
when two constructions open, more reasonable of the two to be	
adopted	... ... 16
in deed, will or Statute when plain and ambiguous and admits	
of one meaning	... ... 23
of will when clear and consistent, how construed	... 25
used when it applies partly to one and partly to another set of	
existing facts	... ... 37
LATENT AMBIGUITY—	
Patent ambiguity and, distinguished	... ... 29
definition of	... ... 29
principle on which rule is founded	... ... 29
extrinsic evidence may not be given to explain	30, 32
instances of	... ... 31
of deed, extrinsic evidence may be given to explain	... 65
how arises	... ... 65
LAW (S)—	
Reason and spirit of cases make the	... ... 2
of nation ; its application	... 184, 185
right of action is not taken away by change of	... 215

	PAGE.
LEGACY (IES)---	
right to, where property bequeathed with a bequest in the alternative 143	
where two, made to the same person in will or codicil, how effected 150	
presumption where, of same amount given by same document 151	
when said to be substitutional 153	
residuary clause passes a lapsed 156	
lapses if legatee does not survive the testator 156	
testator may prevent a, from lapsing 156	
onus of proof to claim, as representative 157	
when it has a vested interest 164	
when it becomes vested in legatee 166	
when bequeathed absolutely to or for benefit of any person with direction in will as to its enjoyment, right of legatee to ... 170	
LEGISLATION---	
of a country is territorial 184	
LEGITIMACY---	
of child, law establishing 107	
LITERAL MEANING---	
what is intended by 60, 61	
of technical words 61	
extrinsic evidence admissible for determining the words ... 61	
MALIK---	
different meanings of 21	
<i>See WORDS.</i>	
MAXIM (S)---	
<i>jus dicere non jus dare</i> 5	
<i>ex antecedentibus et consequentibus</i> 7	
<i>ut res magis valeat quam pereat</i> 8, 78	
<i>verba generalia restringuntur ad habilitatem rei, vel personam</i> ... 15	
<i>absoluta sententia expositore non eget</i> 25, 190	
<i>a verba legis non recedendum est</i> 28, 194	
<i>falsa demonstratio non nocet</i> 32, 78, 115	
<i>contemporanea expositio est optima et fortissima in lege</i> 33	
<i>certum est quod certum reddi potest</i> 36	
<i>surplus agium non nocet</i> 37	
<i>utile per inutile non vitiatur</i> 37, 119	

PAGE.

MAXIM (S)—*contd.*

<i>contemporanea expositio est optima et fortis sima in lege</i>	60
<i>Qui haeret in litera haeret in cortice</i> ...	39
<i>non accipi verba in demonstrationem falsam qui competit in limitationem veram</i> ...	77, 120
<i>expressum facit cessare tacitum</i> ...	86
<i>expressio unius est exclusio tacitum</i> ...	56
<i>expressio unius est exclusio alterius</i> ...	87
<i>verba relata misse ridentur</i> ...	91
<i>verba fortius accipiuntur contra preferentem</i> ...	94
<i>Nihil facit error nominis cum de corpore constat</i> ...	115
<i>veritas nominis tollit errorem demonstrationis</i> ...	115
<i>cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est</i> ...	130
<i>Id certum est quod certum reddi potest</i> ...	134
<i>extra territorium jus dicenti impune non paretur, legis extra territorium non obligant</i> ...	184
<i>lex loci actus or contractus</i> ...	185
<i>generalia specialibus non derogant</i> ...	200
<i>nova constitutio futuris formam debet imponere non præterites</i> ...	214

MOVABLE PROPERTY—

See PROPERTY.

MUST—

See WORDS.

MIS-RECITAL—

<i>when, will not vitiate the deed</i> ...	84
<i>but may influence the construction</i> ...	84
<i>may operate by way of estoppel</i> ...	85

ORAL AGREEMENT—

See AGREEMENT.

ORAL EVIDENCE—

<i>affecting the terms of a deed</i> ...	47
<i>as to contract voidable by Statute or common law</i> ...	52
<i>admissibility of, on equitable grounds</i> ...	52
<i>inadmissible in case of patent ambiguity</i> ...	66

				PAGE.
OFFENCE—				
repeal of former enactment when same, re-enacted with different punishment	...	...	...	220
punishment where act or omission constitute an, under two or more enactments	...	...	...	221
ONUS OF PROOF—				
to claim legacy as representative	...	...	...	157
PARCELS—				
where inserted	...	...	...	75
how described	...	...	...	77, 78
PAROL EVIDENCE—				
<i>See</i> ORAL EVIDENCE.				
PATENT AMBIGUITY—				
latent ambiguity and, distinguished	...	...	...	29
definition of	...	...	...	65
distinction between latent and	...	...	...	65, 66
parol evidence inadmissible in case of	...	...	...	66
case similar to that of	...	...	...	67
PENAL STATUTES—				
<i>See</i> STATUTES.				
PERIOD OF DISTRIBUTION—				
what is meant by	...	...	...	146
PERSONA DESIGNATA—				
definition of	...	...	...	116
PHRASES—				
words and, misuse of	...	...	...	12
_____, control of	...	...	...	13
elimination of words or, when made in deeds, will or Statute	...	...	...	37
words and, assumption as to technical meaning of	...	...	...	189
POTTAH—				
of land, test as to	...	...	...	67
PREAMBLE—				
defined	...	...	...	203
its function	...	...	...	203

PAGE.

PREAMBLE—*contd.*

when can, be resorted to control or explain enacting part	...	203
when enacting clause may be carried beyond	...	204
of a Statute is a good means to find out its meaning	...	204
a key to open the understanding	...	204

PROOF—

of existence of separate oral agreement	...	...	53
of any usage or custom	...	...	54

PROPERTY—

when specific description of, cannot be controlled by general description	...	...	...	...	81
law regulating succession to immovable, in British India	...	...	106		
law regulating succession to movable	...	...	107		
description of, how deemed to refer to and comprise	...	...	134		
right to interest where, is bequeathed to a person	...	...	138		
varying decisions as regards devises of immovable, to Hindu widows	...	...	...	...	140
right to legacy where, bequeathed with a bequest in the alternative	...	...	...	...	143
kinds of estates and interest in	...	...	...	...	166

PUNISHMENT—

repeal of former enactment when same offence re-enacted with different	...	...	...	...	220
where act or omission constitutes an offence under two or more enactments	...	...	...	...	221

RECITAL (S)—

its place in deed	72
not a necessary part of deed	...	...	...	72, 81
not to control operative clause	...	...	...	72
chronological order of	...	...	...	72
its division	...	...	...	72
control of, when operative part of deed clear	...	...	...	81
control of, when operative part of deed ambiguous	...	...	...	82
key to what is intended to be done ..	...	...	...	83
may explain ambiguity in operative part	...	...	...	84
but cannot have effect of introducing covenant in it	...	...	...	84
when does not invalidate subsequent trust in will	...	...	178	

	PAGE.
REMEDIAL STATUTES—	
<i>See STATUTES.</i>	
REPEAL—	
of enactment must be in express terms 217	
RES—	
distinction between, and quantity 152	
RESIDUE—	
surplus and, meaning of 155	
RESIDUARY LEGATEE—	
particular mode of expression not necessary to constitute ... 154	
right of, when nominated generally 155	
RULES—	
summary of general 38	
SCHEDULE—	
enacting part and, cannot be made to correspond ... 206	
appended to an Act for sake of convenience 206	
forms in, mere as examples 206	
SHALL—	
<i>See WORDS.</i>	
STATUTE (S)—	
21 Jac. I, c. 16 190	
21 James I, c. 16, s. 7 23	
1 Vic., c. 26 162	
1 Vic., c. 26, s. 27 179	
24 & 25 Vic., c. 67 184	
28 & 29 Vic., c. 17 184	
32 & 33 Vic., c. 98 184	
56 & 57 Vic., c. 61 202	
definition of 2	
object of interpretation of 3	
literal construction should be put upon 5	
rules for construction of 8, 13	
general provisions in, not to control or repeal special provisions 18	
rule for construction of 18	
reason why special provisions in, are to be read as excepted out of general provisions 19	

	PAGE
STATUTE (S)—<i>contd.</i>	
when general, may repeal a particular one	... ... 19
duty of Court in interpreting a	... ... 22
mere literal construction of, ought not to prevail when opposed to legislature's intention	... ... 23
business of interpreter not to improve, but to expound it	... 26
when a case within the letter is not within the meaning of	... 27
equity of, definition of	... 28
elimination of word or phrase when made in	... 37
Bacon's definition of	... 39
oral evidence as to contract voidable by, or common law	... 52
definition of	... 181
duty of legislature in enacting	... 181
duty of Court as to	... 181
classes of	... 182
is the will of legislature	... 183
to be expounded according to the intent of the legislature	... 183
heads under which the subject of interpretation of, falls	... 184
limit of interpretation and application of	... 187, 188
to be construed as to give a sensible meaning to them	... 188
case within the letter is not within the meaning of	... 193
to be construed according to the intent and object with which they were made	... 193
to be read with reference to the subject-matter	... 195
steps to arrive at the real meaning of	... 198
general provisions in same, not to control or repeal special one	... 199
division of, into parts	... 202
language of, whereof Court entitled to consider	... 207
remedial, how construed	... 210
penal, how construed	... 210, 211, 213
liberal construction of a, meaning of	... 210
rule of construction in expounding remedial	... 211, 212
legal distinction between remedial and penal	... 212
against frauds how construed	... 212
what to be regarded within penal	... 212
of limitation not to be extended by construction	... 213
<i>prima facie</i> deemed to be prospective	... 214
repeal of, by implication	... 216

	PAGE.
STATUTE (S)—<i>concl.</i>	
bare recital in subsequent, not sufficient to repeal provisions of former one 216	
repeal of former, by implication 217	
classes of liabilities founded upon 217	
principle where specific remedy given by 218	
distinction between a, creating a new offence and one enlarging ambit of existing offence 219	
subsequent Acts adding accumulative penalties do not repeal former 220	
effect of repealing a 221	
SUCCESSION—	
to immovable property in British India, law regulating .. 106	
to movable property, law regulating ... 107	
SUCCESSION ACT—	
<i>See</i> ACTS.	
SURPLUS—	
residue and, meaning of 155	
TECHNICAL MEANING—	
defined 61	
of words and phrases, assumption as to 189	
TECHNICAL WORDS—	
must bear their technical meaning 61	
TERRITORIAL JURISDICTION—	
<i>See</i> JURISDICTION.	
THING—	
how to be designated 76	
express mention of one, implies the exclusion of another ... 86	
double gift of the same specific 152	
TRADE—	
agreement in restraint of, how governed 102	
TRUST—	
for perpetual accumulation void as regards will of Hindus ... 124	
execution of, to be under control of Court 132	
when recital does not invalidate subsequent, in will ... 178	
VESTED INTEREST—	
when legacy has a 164	

WAGER—

agreement by way of, void 51

WILL(S)—

definition of 2

object of interpretation of 3

literal constructions should be put upon 5

codicil a part of a 7

true mode of construing a 7

no part of a, to be rejected as destitute of meaning 11

if its language admits of two constructions which to be adopted

language of a, when clear and consistent receives its literal construction 15

unless something to suggest departure from it 15

words of a, convey expression of testator's wishes 15

same words occurring in different parts of a, to be construed in same sense 16

duty of Court in interpreting a 22

language of, when clear and consistent, how construed 25

rule of construction of, as stated by Wygram, v.c. 24

elimination of word or phrase when made in 37

deed is far more formal than 40

deed and, distinguished 41

definition of 105

characteristic of 105

interpretation and construction of, jurisdiction of Court as to ... 106

object of interpretation of 107

golden rule of construction of 107

preference where clause of, susceptible of two meanings 108

construction of, to avoid anomalies 108

no part of, to be rejected as destitute of meaning 108

meaning of any clause in, how to be collected 109

every part of, to be construed with reference to each other 109

codicil is part of a 109

mode of construing a 109

transposition of a clause or an expression when made in a 110

when language of, will receive its literal construction 112

when words may be supplied by context 113

extrinsic evidence to determine application of words in a 120

trust for perpetual accumulation void as regards, of Hindus ... 124

	PAGE.
WILL(S)—<i>contd.</i>	
construction of, as expressed by Lord Kenyon ...	... 126
preference where two clauses in a, irreconcilable ...	... 130
when void for uncertainty ...	... 132
where two legacies are made to the same person in, or codicil how to be effected ...	... 150
when does not include codicil ...	... 151
order to prevent a legacy from lapsing must be specially penned	156
when it takes effect ...	... 164
WILLS ACT—	
law of specific legacy not to be altered by s. 24 of <i>See ACT.</i>	... 135
WORD(S).—	
change of, “or” into “and” substituting a reasonable for unreasonable scheme of disposition ...	... 13
to be construed <i>ut res magis valeat quam patreat</i> ...	... 13
and phrases, control of ...	... 13
and phrases, misuse of ...	... 12
mode of construing, of an instrument ...	... 14
not to be extended beyond their ordinary sense ...	... 14
not to be restricted as to include a case ...	... 14
not to violate the fundamental rules ...	... 14
accidental omission of, in an instrument ...	... 14
when general, not to be extended ...	... 15
referring to matters <i>ejusdem generis</i> ...	... 15
in general are to be taken in their ordinary sense ...	... 15
of will convey expression of testator's wishes ...	... 15
but meaning attached to, may be affected by surrounding circumstances ...	... 15
among circumstances affecting, is the law of the country ...	15
assumption when law attending particular meaning to particular “malik” only pass a limited estate ...	16
“dakhilar” construed in a limited sense ...	16
same, occurring in different parts of will to be construed in same sense ...	16
unless an intention to the contrary ...	16
but when same, applied to different subject-matter bear a different meaning ...	16

WORD(S)—*contd.*

WORD(S)—<i>contd.</i>	PAGE.
substitution of, "must" or "shall" for "may" ...	... 17
sense in which well-known, are used ...	... 18
when grammatical and ordinary sense of, to be adhered to ...	... 20
what is meant by above expression ...	... 21
technical use of ...	... 21
reading of, "and" as "or" ...	... 25
not to be interpreted or construed unless admit of two meanings ...	... 25
elimination of, or phrase when made in Statutes, deeds or wills	37
power of Court to alter or insert, in instrument ...	... 37
intention of legislature to be collected from, used	... 29
limit as to operation of general ...	... 63
in operative part of a deed, control led by recital	... 82
control of clear, in conveyance by words of recital	... 83
when general, to be understood in a restricted sense	... 110
when, in a will may be supplied by context	... 113
application of, in a will to be determined by extrinsic evidence	120
phrases and, assumption as to technical meaning of	... 189
of law when clear and positive not to be controlled by any consideration ...	... 192
"must" or "shall" when may be substituted for "may" ...	196
<i>meaning of—</i>	
putro pontradi ...	... 22
beyond the sea ...	... 23
all claims enforceable under the attachment ...	... 23
the decree-holders ...	... 23
between parties to the deed ...	... 49
sontan ...	... 61
naslan bad naslan ...	... 22, 61
aivaj ...	... 64
appoint ...	... 74
assign ...	... 74
alien ...	... 74
confirm ...	... 74
convey ...	... 75
grant ...	... 75
livery ...	... 75
surrender ...	... 75

						PAGE.
WORD(S)—<i>contd.</i>						
release	...	...	...	...	...	75
remise release and quit claim	...	...	...	...	...	75
acquit release and quit claim	...	...	...	...	...	75
denise	...	...	...	...	...	75
acts	...	...	...	...	...	95
means	95
effect	108
dakhilar	112
malik	112

WRITEN INSTRUMENT—*See INSTRUMENT.*

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